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Supreme Court, U.S.
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No. 02- 02-65

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IN THE

Supreme Court of the United States

GREEN SPRING HEALTH SERVICES, INC., *et al.*,
Petitioners,

v.

PENNSYLVANIA PSYCHIATRIC SOCIETY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Third Circuit correctly held—in conflict with this Court's precedents—that an association has standing to bring suit not on behalf of itself, and not on behalf of its members, but on behalf of its members' patients, where the association itself has suffered no independent injury-in-fact and lacks any affiliation with the patients on whose behalf it purports to sue?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Green Spring Health Services, Inc. ("Green Spring"), Magellan Health Services, Inc. ("Magellan"), Highmark, Inc. ("Highmark"), Keystone Health Plan West, Inc. ("Keystone West"), Keystone Health Plan Central, Inc. ("Keystone Central"), and Keystone Health Plan East, Inc. ("Keystone East") were the defendants and appellees below.

Pursuant to S. Ct. Rule 29.6, petitioners state that Magellan is the corporate parent of Green Spring; that Highmark is the corporate parent of Keystone West; that Highmark and Capital Blue Cross are the corporate parents of Keystone Central; and that Independence Blue Cross, AmeriHealth, Inc., AmeriHealth Integrated Benefits, Inc., and AmeriHealth HMO, Inc. are the corporate parents of Keystone East. No publicly held company owns 10% or more of petitioners' stock.

Respondent Pennsylvania Psychiatric Society is a nonprofit organization and was the plaintiff and appellant below.

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PETITION FOR A WRIT OF CERTIORARI

Green Spring Health Services, Inc., *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Third Circuit reversing the District Court's dismissal is reported at 280 F.3d 278 and reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court adopting the Magistrate Judge's report and recommendation and granting petitioners' motions to dismiss is not reported and is reprinted at App. 28a. The Magistrate Judge's report and recommendation is not reported and is reprinted at App. 30a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 2002. App. 1a. A timely petition for rehearing and rehearing en banc was denied on March 11, 2002. App. 44a. On June 4, 2002, Justice Souter extended the time within which to file a petition for certiorari to and including July 10, 2002. App. 46a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, section 2 of the United States Constitution provides, in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under * * * the Laws of the United States * * *."

INTRODUCTION

This case concerns an important aspect of Article III's "Case" or "Controversy" requirement and the standing doctrine implementing that constitutional limitation. This Court has consistently held that, with rare exception, litigants bringing suit in federal court must themselves have suffered some injury-in-fact and raise claims in which they themselves have a personal stake, not those based on "another person's legal rights." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). Two limited exceptions exist: one permits an association that has not itself suffered injury to bring suit on behalf of its members if the members would otherwise have standing to do so "in their own right," *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977), while the other permits litigation on behalf of third parties so long as the litigant himself has otherwise suffered a sufficient injury-in-fact and shares some close relationship with the party on whose behalf he purports to sue.

The question presented in this case is whether these two limited exceptions can be "stacked" or "piggy-backed" one on top of the other to create yet another, more attenuated

exception. A divided panel of the Third Circuit ruled that an association that has not suffered injury to itself may nevertheless bring suit not on behalf of its members, but on behalf of its *members' patients*—individuals with whom the association shares no affiliation whatsoever. The court below reasoned that, so long as the association would have associational standing to press its members' claims—the first exception to traditional standing principles—and so long as the members would have third-party standing to raise claims on their patients' behalf—the second exception—then the association could also advance the rights of its members' patients.

That ruling directly conflicts with the precedents of this Court. As Judge Nygaard pointed out in dissent, an association "cannot piggy-back two discrete *exceptions*, to swallow up the long-standing *rule* that litigants must assert their own rights and interests." App. 24a (emphases in original). The novel doctrine of "derivative standing" announced by the court below fits into none of the limited exceptions this Court has established. It does not come within the rubric of associational standing, since that exception requires that the association raise claims that its members could litigate "in their own right." Nor is the rule faithful to the third-party standing exception, since it empowers an organization to litigate on behalf of distant third parties without having suffered any injury itself. Moreover, the expansive exception endorsed by the Third Circuit threatens fundamental separation-of-powers concerns that the standing doctrine carefully guards. As this case underscores, an organization with no personal stake in the litigation has been able to seek "broad-based changes" to the managed-care industry in the name of third parties with whom it shares no relationship. Liberalizing the rules of standing to such a degree will invariably make the judiciary, rather than the legislature, the principal forum for resolving weighty and often abstract social-policy

issues. This Court should grant certiorari to resolve the multiple conflicts on the important question presented.

STATEMENT OF THE CASE

Green Spring administers behavioral health and substance abuse services for many Pennsylvania residents enrolled in managed care plans. By entering into individual Provider Participation Agreements ("Provider Agreements") with psychiatrists throughout the State, Green Spring establishes a network of participating psychiatrists. It then enters into agreements ("Service Agreements") with various employers and health maintenance organizations—among them Keystone West, Keystone Central, and Keystone East (collectively, "the HMOs")—that wish to incorporate the Green Spring network into their benefit plans. The combined effect of the Provider Agreements and the Service Agreements is to establish a system through which the participating psychiatrists render behavioral health and substance abuse services to individuals enrolled in benefit plans administered by the HMOs that have contracted with Green Spring.

Respondent Pennsylvania Psychiatric Society ("PPS") is a nonprofit organization of psychiatrists practicing in Pennsylvania. Although many of its member-psychiatrists have signed Provider Agreements with Green Spring, PPS itself has no relationship—contractual or otherwise—with Green Spring or its corporate parent, Magellan. Nor for that matter does PPS share any connection with its members' patients; it is purely a professional association open only to psychiatrists licensed in Pennsylvania and devoted exclusively to advancing their particular interests.

Seeking to reform managed-care practices through litigation, PPS brought suit against Green Spring, Magellan, Highmark,[1] and the HMOs (collectively, the "managed care

[1] Highmark provides managed-care programs in conjunction with its subsidiary, Keystone West.

organizations" or "MCOs"), alleging a variety of state-law claims sounding in tort and contract.[2] Among its allegations, PPS maintained that the MCOs failed to authorize medically necessary mental health and substance abuse services; interfered with patients' care by delegating psychiatric treatment decisions to non-psychiatrists; referred patients to treatment locations PPS deemed inconvenient; and generally suppressed utilization and hindered the ability of PPS members to practice psychiatry.

Despite its broad-based attack on the way in which MCOs deliver psychiatric care, PPS did not allege that it had been harmed itself in any way by the practices identified in the complaint. Rather, PPS purported to raise claims on behalf of two distinct groups: its member-psychiatrists and the patients of those member-psychiatrists. None of the patients are members or otherwise affiliated with PPS. On behalf of both groups, PPS sought damages as well as declaratory and injunctive relief.

The MCOs moved to dismiss, arguing that PPS lacked standing to press the claims of both its member-psychiatrists and their patients. As for the members' claims, the MCOs contended that associational standing was inappropriate because PPS's claims would improperly "require[] the participation of individual members in the lawsuit." *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. at 343.

Even clearer, the MCOs argued, was PPS's inability to litigate on behalf of non-member patients. For an entity to

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[2] The action was initially filed in the Court of Common Pleas of Allegheny County, Pennsylvania, but was later removed to the United States District Court for the Western District of Pennsylvania because the claims are preempted by the civil enforcement provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B). *See Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 66 (1987); *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51-52 (1987).

gain "standing to advance the * * * rights of others," this Court has always required that it have independently "suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement." *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617, 623 n.3 (1989). Because PPS conceded that it was in no way injured by the practices it assailed in its complaint, the MCOs argued that PPS's attempt to bring suit on behalf of its members' patients necessarily failed.

The District Court agreed and dismissed the case for lack of standing.[3] App. 28a-29a. Notwithstanding the fact that PPS sought what it termed "broad-based changes" to the MCOs' practices, the court found that "to prove such 'broad based' changes are warranted, PPS will have to establish that the alleged abuses occurred," which "will necessarily entail the involvement in this litigation of [individual] PPS members." *Id.* 36a. The court therefore found PPS lacked associational standing to advance its members' claims.

Turning to PPS's claims brought on behalf of its members' patients, the court found dispositive the fact that "PPS does not allege that it has itself suffered concrete injury." *Id.* 37a. As the court recognized, injury-in-fact is an essential "preliminary requirement for third party standing." *Id.* Because PPS, by its own admission, does not meet that threshold requirement, "the claims made on behalf of the patient-subscribers must be dismissed." *Id.* Moreover, even putting that jurisdictional omission aside, the court held third-party standing was improper for prudential reasons. Noting that third-party standing is proper only where the litigant and the third-party share a close relationship, the District Court held that "the 'relationship' between PPS and the patient-

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[3] The District Court referred the matter to a magistrate judge, who issued a detailed report recommending that the case be dismissed for lack of standing. App. 30a. The District Court adopted the magistrate judge's recommendation in full. App. 28a.

subscribers is so attenuated as to weigh against permitting PPS to bring suit on behalf of persons with which it has no direct relationship." *Id.* 38a.

PPS appealed and a divided panel of the Third Circuit reversed. Because PPS abandoned its prayer for damages on appeal—thus limiting the suit to one for declaratory and injunctive relief—the majority found the risk that individual members would need to participate in the lawsuit sufficiently mitigated. *Id.* 7a. It accordingly ruled that PPS had alleged facts that, if proven true, would establish associational standing for its members' claims. *Id.* 7a-11a.

As for PPS's ability to advocate on behalf of its members' patients, the panel began its analysis by properly recognizing that, absent narrow exceptions, a " 'litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.' " *Id.* 13a (quoting *Powers* v. *Ohio*, 499 U.S. 400, 410 (1991)). The panel also recognized that "the Pennsylvania Psychiatric Society itself has not suffered direct injury." *Id.* 15a.

The majority nevertheless went on to rule that PPS had third-party standing to represent the interests of its members' patients. Notwithstanding this Court's decisions to the contrary, the majority ruled that PPS itself need not have suffered injury-in-fact to raise the claims of third parties. The court below justified its rule by employing a novel syllogism of its own design: (1) PPS's member-psychiatrists would presumably have third-party standing to represent their patients; (2) PPS has associational standing to represent its members; therefore (3) PPS has third-party standing to assert the claims of the patients that its members would have third-party standing to assert. *Id.* 15a. The upshot of the panel's "derivative standing" doctrine was to establish a rule that: "So long as the association's members have or will suffer sufficient injury to merit standing and their members possess standing to represent the interests of third-parties, then

associations can advance the third-party claims of their members without suffering injuries themselves." *Id.* 21a. Thus, even though the panel recognized that "the Society does not itself stand in an appropriate relationship to the patients' claims to directly assert them," it thought that fact irrelevant, since PPS's "members may have third-party standing to do so." *Id.* 15a.

The panel again employed this transitive analysis in evaluating whether PPS shared a sufficiently close relationship with the patients on whose behalf it purported to litigate. Rather than focus on the actual relationship between the litigant—here, PPS—and the third-party—the patients—as this Court's precedents dictate, the court below examined the relationship between the *member-psychiatrists*—who are not parties to the lawsuit—and their patients. The panel thought this method of analysis proper because, given the fact that PPS "seeks to establish standing on the basis of its members' standing to bring these claims, *the members are the appropriate focus of inquiry for these purposes*." *Id.* 15a (emphasis added).

Judge Nygaard dissented. He found no authority for the majority's "hybrid-type of third-party derivative standing." *Id.* 24a. Although he agreed that PPS has associational standing to raise its members' claims, and that the individual psychiatrists would presumably have third-party standing to assert their patients' claims, he emphasized that "PPS cannot piggy-back two discrete *exceptions*, to swallow up the long-standing *rule* that litigants must assert their own rights and interests." *Id.* (emphases in original). Underscoring the unprecedented nature of the majority's new rule, Judge Nygaard concluded: "I cannot find, nor does PPS cite, any authority for stacking or piggy-backing these relationships into an attenuated concatenation of exceptions to the standing rule so as to confer standing on PPS." *Id.*

Rather than invent a new hybrid rule for evaluating the ability of an association to press the claims of its members' patients, Judge Nygaard would have applied the "basic test for third-party standing" that the Third Circuit had fashioned from this Court's precedents. *Id.* 24a-25a. At its core, that test requires that "the party seeking standing has suffered an injury in fact." *Id.* 24a. Because "[n]o one disputes th[e] fact" that "PPS did not itself suffer an injury," Judge Nygaard found that PPS "cannot satisfy [the] most elementary standard" for evaluating third-party standing claims. *Id.* 25a. On that basis alone, Judge Nygaard would have denied PPS third-party standing. And in any event, Judge Nygaard agreed with the District Court that prudential considerations militated against PPS's third-party standing claims, given "the remoteness of the relationship between PPS and its members' patients." *Id.* 25a. *See id.* ("The relationship between PPS and the patients is nothing like the doctor/patient intimacy that supports that exception.").

The MCOs filed a timely petition for rehearing and rehearing en banc, which was denied on March 11, 2002. App. 44a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS LIMITING THIRD-PARTY STANDING.

Two fundamental rules—one constitutional, the other prudential—guide this Court's standing jurisprudence. The first provides that a litigant "must allege personal injury," while the second establishes a "general prohibition on a litigant's raising another person's legal rights." *Allen* v. *Wright*, 468 U.S. at 751. From these bedrock principles, this Court has carved but two discrete exceptions. *First*, when "bring[ing] suit on behalf of its members," an association need not allege injury to itself, so long as "its members would otherwise have standing to sue in their own right."

Hunt v. *Washington State Apple Adver. Comm'n*, 432 U.S. at 343. *See, e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975). *Second*, the normal injunction against raising the rights of parties absent from the litigation may be lifted if, but only if, the litigant himself has otherwise suffered a personal "injury in fact" and the litigant has a "close relation" to the party whose rights are asserted. *Powers* v. *Ohio*, 499 U.S. at 411. *See, e.g.*, *Miller* v. *Albright*, 523 U.S. 420, 445-447 (1998) (O'Connor, J., concurring in the judgment); *Caplin & Drysdale, Chtd.* v. *United States*, 491 U.S. at 623-624 n.3.

The Court of Appeals' decision in this case represents a startling departure from these precedents. The holding below that an association may bring suit not on behalf of its members but on behalf of its *members' patients*, when the association itself has suffered no independent injury and shares no close relationship with the patients it seeks to represent, improperly conflates the two distinct exceptions discussed above. Such a rule does not fit within the exception for associational standing, since the claims the association raises belong to its members' patients, not the members themselves. Nor does it come within the exception for third-party representation, since the association has suffered no injury to itself and boasts no relationship whatsoever with the group on whose behalf it purports to sue. *See* App. 24a (Nygaard, J., dissenting) ("PPS cannot piggy-back two discrete *exceptions*, to swallow up the long-standing *rule* that litigants must assert their own rights and interests.") (emphases in original). The petition should be granted to resolve the fundamental conflict between the decision below and those of this Court. *See* S. Ct. Rule 10(c) (one of the principal considerations governing the exercise of certiorari jurisdiction is whether a court of appeals "has decided an important question in a way that conflicts with relevant decisions of this Court").

1. Article III of the Constitution limits the jurisdiction of the federal courts to deciding "Cases" or "Controversies," and "[s]tanding to sue * * * is an aspect of the case or

controversy requirement." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997). Whether in their own right or on behalf of others, all litigants seeking redress from the federal judiciary must therefore satisfy this "irreducible constitutional minimum." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). To do so requires first and foremost that the litigant "demonstrate that he has suffered 'injury in fact.' " *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997) (quoting *Defenders of Wildlife*, 504 U.S. at 560).[4] For this Court has long held that "Article III judicial power exists only to redress or otherwise to protect against injury to the complaining party." *Warth* v. *Seldin*, 422 U.S. at 499. *See Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) ("The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is therefore restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate.").

Being constitutional in nature and therefore "immutable," *Bennett* v. *Spear*, 520 U.S. at 162, the injury-in-fact requirement necessarily applies even to litigants who raise only claims of third parties. Indeed, this Court has squarely held that third-party standing implicates *both* constitutional and prudential considerations: "When a person or entity seeks standing to advance the constitutional rights of others, we ask two questions: first, has the litigant suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement." *Caplin & Drysdale, Chtd.* v. *United States*, 491 U.S. at 623-624 n.3. *See Powers* v. *Ohio*, 499 U.S. at

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[4] Article III standing also requires a litigant to prove not only "injury in fact," but also that "the injury is fairly traceable to the actions of the defendant and that the injury will likely be redressed by a favorable decision." *Bennett* v. *Spear*, 520 U.S. at 162 (internal quotations omitted). *Accord Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102-103 (1998).

411 ("The litigant must have suffered an 'injury in fact,' thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute.") (internal quotation omitted). Only if the litigant can satisfy this constitutional standard by "show[ing] that he *personally* has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979) (emphasis added), does this Court proceed to ask the second question: "do prudential considerations which we have identified in our prior cases point to permitting the litigant to advance the claim?" *Caplin & Drysdale, Chtd.* v. *United States*, 491 U.S. at 623-624 n.3.

2. The Court of Appeals' decision in this case squarely conflicts with this Court's precedents. The panel below found that PPS "itself has not suffered direct injury," App. 15a—a fact "[n]o one disputes." *Id.* 25a (Nygaard, J., dissenting). That should have been the end of the matter. For under this Court's precedents, as Judge Nygaard recognized in dissent, "because PPS has not even alleged a concrete injury to itself, it cannot satisfy [the] most elementary standard" for Article III's case-or-controversy requirement. *Id.*; *see id.* ("Standing should be denied to PPS on this test alone."). Yet the divided panel ignored this basic constitutional constraint on federal court jurisdiction, announcing an unprecedented rule allowing "associations [to] advance the third-party claims of their members without suffering injuries themselves." *Id.* 21a.

The Court of Appeals justified its marked deviation from settled precedent by fashioning a doctrine it dubbed "derivative standing," *id.* 19a, 20a—an amalgam of two distinct exceptions to traditional standing doctrine cobbled together to form a third more tenuous exception. The first step in the Court's analysis was its conclusion that PPS's *member-psychiatrists* had alleged injury-in-fact and that PPS therefore had associational standing to press *its members'* claims under *Hunt* v. *Washington State Apple Advertising Commission.*

App. 12a; *id.* 15a ("Although the Pennsylvania Psychiatric Society itself has not suffered direct injury, it is uncontested that it properly pleaded that defendants' policies and procedures have economically injured its member psychiatrists and undermined their ability to provide quality health care."). The court's second step was to speculate that PPS's member-psychiatrists would have third-party standing to advance their patients' claims—a purely hypothetical inquiry, since none of the members is a party to the suit and the complaint alleges no third-party claim on behalf of patients brought by their psychiatrists. *Id.* 15a ("while the Society does not itself stand in an appropriate relationship to the patients' claims to directly assert them, its members may have third-party standing to do so"). Applying both the constitutional and prudential tests for third-party standing, the court below concluded that PPS's members—had they brought suit on their patients' behalf—would have had third-party standing because the psychiatrists had alleged direct injury to themselves, *id.* 15a, they "clearly have the kind of relationship with their patients which lends itself to advancing claims on their behalf," *id.* 16a, and their patients "face obstacles to pursuing litigation themselves." *Id.*

Whatever may be said for the court's first two steps, they formed the springboard for yet another athletic leap in logic wholly without precedent. From those two premises, the court reasoned that "when an association, which has not sustained direct injury, obtains standing to pursue the claims of its members, the association may rely on the injuries sustained by its members to satisfy the injury-in-fact requirement" for raising third-party claims. *Id.* 21a. In other words: "So long as the association's members have or will suffer sufficient injury to merit standing and their members possess standing to represent the interests of third-parties, then associations can advance the third-party claims of their members without suffering injuries themselves." *Id.* By thus employing such transitive analysis and making "the members

* * * the appropriate focus of inquiry," *id.* 15a, the court below extended third-party standing to PPS without demanding a showing of independent injury to the association itself.

3. The Third Circuit's belief that "these exceptions can be 'stacked' to concoct a new exception to the standing rule," App. 24a (Nygaard, J., dissenting), reflects a fundamental misunderstanding of this Court's precedents—as they relate to the doctrines of both associational and third-party standing.

To begin with, the Third Circuit's rule that an association with standing to press its *members'* claims satisfies the injury-in-fact requirement to bring suit on behalf of its *members' patients* conflicts with *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. at 342-344. There, this Court held that an association that does not itself suffer injury-in-fact may nevertheless "bring suit on behalf of its members when * * * its members would otherwise have standing to sue *in their own right*." *Id.* at 343 (emphasis added). Whatever might be said about whether PPS has associational standing to bring suit on behalf of its members, *Hunt* clearly forecloses PPS from bringing suit on behalf of its *members' patients* for injuries the patients—not the members—suffered. That is because regardless of whether psychiatrists have third-party standing to bring suit on behalf of their patients, such claims would be just that: for the benefit of their patients, not "in [the members'] own right." *Id.* *See Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976) (an association "can establish standing only as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right").

This limitation makes eminent sense in light of the basic role of standing doctrine in ensuring that a plaintiff has a concrete interest in the claim before the court. An association suing on behalf of its members under *Hunt* is already

bringing a third-party claim—the members themselves are not parties to the litigation, only the association is—yet it is the members' claims that will be adjudicated by the court. Allowing an association to assert claims its members might bring on behalf of *other* third parties would be conferring on the association third-party standing twice-removed. Such attenuation of the basic standing requirement that the plaintiff have a "personal stake in the outcome of the litigation" has never been sanctioned by this Court. *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 543-544 (1986). *See Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. at 39 ("The necessity that the plaintiff who seeks to invoke the judicial power stand to profit in some personal interest remains an Art. III requirement.").

That associational standing is not an undifferentiated license for an organization to bring *any* claim that its members might otherwise raise—as the court below thought—is confirmed by *Hunt*'s further requirement that "the interests [the organization] seeks to protect are germane to the organization's purpose." *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. at 343. *See United Food & Commercial Workers Union Local 751* v. *Brown Group, Inc.*, 517 U.S. 544, 555-556 (1996) (*Hunt*'s second requirement is "complementary to the first, for it[] * * * raises an assurance that the association's litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant's natural adversary"). It is one thing to say that a lawsuit brought on behalf of licensed psychiatrists will protect interests that are germane to a professional association founded entirely to promote the interests of those licensed psychiatrists. But it is quite another to say that a lawsuit aimed at expanding the rights of *patients* under managed-care plans is an inherent interest of an organization whose membership is closed to that very constituency. Indeed, there is good reason to believe that a professional association of psychiatrists intent on increasing its members'

compensation may actually be working at cross-purposes to the interests of its members' patients, since greater rates of reimbursement will invariably lead to greater premiums—making health care more expensive for individuals and employers alike, and in some cases, prohibitively so. It is precisely that danger that informs "the understanding," so central to the presumption against third-party standing, "that the third-party rightholder may not, in fact, wish to assert the claim in question." *Miller* v. *Albright*, 523 U.S. at 446 (O'Connor, J., concurring in the judgment). *See Singleton* v. *Wulff*, 428 U.S. 106, 113-114 (1976) ("the courts should not adjudicate [third-party] rights unnecessarily [because] it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not").

The decision of the Third Circuit thus makes an unwarranted departure from this Court's associational-standing jurisprudence. And in doing so, it embraces a rule that erroneously makes an association's *members* "the appropriate focus of inquiry," App. 15a, for evaluating whether the *association*, in bringing suit on behalf of third-parties, has "suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement." *Caplin & Drysdale, Chtd.* v. *United States*, 491 U.S. at 623-624 n.3. That runs directly counter to this Court's teachings in *Hunt*, *Powers*, and other cases. *See, e.g.*, *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 955-956 (1984); *Singleton* v. *Wulff*, 428 U.S. at 113-116.

4. The Third Circuit's misguided belief that an association's members are the "appropriate focus of inquiry" for third-party claims brought by the association not surprisingly drew it into direct conflict with this Court's precedents regarding not just the constitutional but also the prudential limits on third-party standing. In particular, this Court has held that a litigant raising another's claims must have a "close relation" to the party whose rights it asserts. *Powers*

v. *Ohio*, 499 U.S. at 411. That means that the litigant and the rightholder must have established an actual relationship that demonstrates a "congruence of interests" with respect to the matters being litigated, thus "mak[ing] it necessary and appropriate for the [litigant] to raise the rights of the" third party and ensuring that the proxy suit will result in " 'little loss in terms of effective advocacy.' " *Id.* at 413-414 (quoting *Craig* v. *Boren*, 429 U.S. 190, 194 (1976)). *See, e.g.*, *Department of Labor* v. *Triplett*, 494 U.S. 715, 720-721 (1990) (lawyer and client); *Caplin & Drysdale, Chtd.* v. *United States*, 491 U.S. at 623-624 & n.3 (lawyer and client); *Craig* v. *Boren*, 429 U.S. at 195 (vendor and customer); *Singleton* v. *Wulff*, 428 U.S. at 114-117 (doctor and patient); *Eisenstadt* v. *Baird*, 405 U.S. 438, 445 (1972) (doctor and patient).

No such relationship remotely exists between a professional association and the patients of its member-psychiatrists. *See* App. 25a (Nygaard, J., dissenting) ("The relationship between PPS and the patients is nothing like the doctor/patient intimacy that supports that exception to the standing rule."). The Third Circuit did not suggest otherwise. Instead, it erroneously considered whether the organization's members—who, it bears repeating, are *not* litigants in this suit—had the necessary close relationship with the third-party patients. As we have explained, that focus cannot be reconciled with this Court's relevant precedents.

5. Finally, by embracing a rule that dramatically expands the scope of the third-party standing doctrine, the decision of the court below squarely conflicts with those of this Court that "ha[ve] long applied a presumption against third-party standing." *Miller* v. *Albright*, 523 U.S. at 445 (O'Connor, J., concurring in the judgment). *See Warth* v. *Seldin*, 422 U.S. at 499. As this Court has emphasized, the normal rule is that "a litigant *must* assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers*, 499 U.S. at

410 (emphasis added). It is a rule that operates as a "fundamental restriction" on the power of the federal judiciary and the exceptions to it are both "certain" and "limited." *Id.*

The Third Circuit's "derivative standing" exception is neither certain nor limited. It is instead an expansive "hybrid," App. 24a (Nygaard, J., dissenting)—forged from the alloy of two already *limited* exceptions to the standing doctrine—that boasts neither doctrinal certainty nor any principled limitation. As Judge Nygaard put it in dissent, an association simply "cannot piggy-back two discrete *exceptions*, to swallow up the long-standing *rule* that litigants must assert their own rights and interests." *Id.* 21a. Certiorari is warranted to resolve the numerous conflicts between the Third Circuit's decision and those of this Court.

II. THE QUESTION PRESENTED CONCERNS AN IMPORTANT AND RECURRING ISSUE OF SEPARATION OF POWERS THAT SHOULD BE DECIDED BY THIS COURT.

The conflicts presented by this petition provide a compelling basis for plenary review, but the need for certiorari is heightened still further by the importance of the question presented. By granting organizations standing to sue on behalf of third parties without demonstrating any independent injury-in-fact, the decision below threatens " 'the proper—and properly limited—role of the courts in a democratic society.' " *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997) (quoting *Warth* v. *Seldin*, 422 U.S. at 498). As this case demonstrates, under the Third Circuit's "derivative standing" doctrine, organizations suffering no injury and purporting to act on behalf of distant third parties will be able to commandeer the federal judiciary into resolving weighty, abstract issues of social policy best left—and until the decision below, traditionally left—to legislative determination. Such a promiscuous extension of the third-party standing doctrine will invariably "carr[y] the courts beyond the bounds of

authorized judicial action and thus offend[] fundamental principles of separation of powers." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. at 94.

1. Article III's "Case" or "Controversy" mandate "is not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to be adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. at 476. *See also Mansfield, C. & L.M.R. Ry.* v. *Swan*, 111 U.S. 379, 382 (1884) (restrictions on federal court jurisdiction "spring[] from the nature and limits of the judicial power of the United States"). Indeed, " '[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.' " *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. at 27). *See Flast* v. *Cohen*, 392 U.S. 83, 96 (1968). The standing doctrine thus operates as a guidepost, "setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III—'serv[ing] to identify those disputes which are appropriately resolved through the judicial process.' " *Lujan* v. *Defenders of Wild-life*, 504 U.S. at 560 (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990)).

This Court's precedents make clear that "[t]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen* v. *Wright*, 468 U.S. at 752; *accord Raines* v. *Byrd*, 521 U.S. at 820. *See also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk L. Rev. 881 (1983). By conditioning judicial relief upon a showing of concrete injury and proof that the litigant " 'personally would benefit in a tangible way from the court's intervention,' " *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. at 103 n.5 (quoting

Warth v. *Seldin*, 422 U.S. at 508), the standing doctrine "prevent[s] courts from undertaking tasks assigned to the political branches." *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996). That gatekeeping function is crucial, for "the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 559-560. *See also Freytag* v. *Commissioner*, 501 U.S. 868, 870 (1991) ("The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government."); *Myers* v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.").

2. Because of this "overriding and time-honored concern" for the properly limited role of the federal judiciary, *Raines* v. *Byrd*, 521 U.S. at 820, it is essential that courts not be called upon "to decide abstract questions of wide public significance"—particularly when "other governmental institutions may be more competent to address [those] questions." *Warth* v. *Seldin*, 422 U.S. at 500. Yet that is precisely what the Third Circuit's rule ensures. In this case, for example, an organization with a purely rooting interest has been granted standing to seek—in its own words—"broad-based changes" to the fundamental way in which psychiatric managed care is delivered. App. 36a. But the separation-of-powers concerns that the standing doctrine jealously protects would be weakened considerably were the judicial process converted into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973). *Cf. Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 225 (1974) ("We have no doubt about the sincerity of respondents' stated objectives and the depth of their com-

mitment to them. But the essence of standing is not a question of motivation but of possession of the requisite * * * interest that is, or is threatened to be, injured * * *.") (quotation omitted). And given the fact that "[o]ver the past several years the judiciary has become a major venue for challenging managed care," Vicki Lens, *Managed Care and the Judicial System: Another Avenue for Reform?*, 27 Health & Soc. Work 27, 27 (Feb. 2002), the expansive third-party standing rule adopted by the court below poses a very real threat to those fundamental separation-of-powers concerns. *See United States* v. *Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring) ("Relaxation of standing requirements is directly related to the expansion of judicial power.").

Indeed, certiorari is particularly warranted, because decisions regarding whether and to what extent there should be "broad-based changes" to managed care are peculiarly within the bailiwick of the legislature. In *Pegram* v. *Hedrich*, 530 U.S. 211 (2000), this Court addressed a similarly comprehensive assault on the way in which managed-care organizations structure their services and incentives. Such claims, this Court observed, turned on "judgment[s] about socially acceptable medical risk," which "would * * * necessarily turn on facts to which courts would probably not have ready access." *Id.* at 221. That fact led this Court to emphasize that "a debatable social judgment [is] not wisely required of courts unless for some reason resort cannot be had to the legislative process," with its "preferable forum for comprehensive investigations and judgments of social value, such as optimum treatment levels and health-care expenditures." *Id.*

Nor is there any question that resort may be had to the legislative process. In the 106th Congress, for example, the House of Representative and the Senate each passed a version of legislation—popularly known as the "Patients Bill of Rights"—that would have enacted far-reaching reforms to the managed-care industry. *See* S. 1344, 106th Cong. (1999);

H.R. 2990, 106th Cong. (1999). And in the current Congress, two bills have been introduced that would again mandate comprehensive changes to the structure and delivery of managed care. *See* S. 889, 107th Cong. (2001); S. 283, 107th Cong. (2001). Both bills would do precisely what PPS purports to do on behalf of its members' patients: "protect consumers in managed care plans and in other health coverage." S. 889, 107th Cong., pmbl; *accord* S. 283, 107th Cong., pmbl.

The Third Circuit's dubious doctrine of "derivate standing" thus threatens to transfer from the legislative branch to the judiciary the sorts of "debatable social judgment[s]" that the courts are particularly ill-suited to make. *Pegram* v. *Hedrich*, 530 U.S. at 221. Such a result will benefit neither the judicial nor legislative branches of government, and the "public confidence essential to the former and the vitality critical to the latter" will invariably suffer. *United States* v. *Richardson*, 418 U.S. at 188.

3. PPS is not the first—and it certainly will not be the last—organization to bring suit on behalf of third parties without suffering any direct injury to itself. *See Fraternal Order of Police* v. *United States*, 152 F.3d 998, 1002 (D.C. Cir. 1998), *cert. denied*, 528 U.S. 928 (1999); *Ohio Ass'n of Ind. Schs.* v. *Goff*, 92 F.3d 419, 422 (6th Cir. 1996), *cert. denied*, 520 U.S. 1104 (1997); *Public Citizen* v. *Federal Trade Comm'n*, 869 F.2d 1541, 1550 (D.C. Cir. 1989). Although more cursory than the Third Circuit's analysis, decisions from the other courts of appeals addressing the same issue have likewise assumed that the ability of an organization's members to sue on behalf of third parties necessarily vests the organization with third-party standing over those same claims. In *Fraternal Order of Police*, the court ruled that an association of Chief Law Enforcement Officers ("CLEOs") could bring suit on behalf of non-member police officers. Like the Third Circuit below, the D.C. Circuit misconstrued this Court's precedents, conclud-

ing—without any significant analysis—that because the CLEOs would have third-party standing to assert the rights of their fellow officers, the organization necessarily would have "standing to make[] these claims as well." 152 F.3d at 1002. Based on the same rationale, the D.C. Circuit had earlier ruled that a consumer-advocacy group could press claims on behalf of its member-parents' children even though the organization itself had suffered no injury-in-fact. *Public Citizen*, 869 F.2d at 1550. Likewise, the Sixth Circuit ruled in *Goff* that "an organization dedicated exclusively to advancing the interests of [its] member schools" would have standing to litigate on behalf of not only its member schools but would "also have standing to assert the constitutional right of parents to direct their children's education." 92 F.3d at 422.

These decisions underscore the recurring nature of the question presented in the petition. And the perfunctory analysis each employs in concluding that associations need not suffer injury-in-fact to raise the rights of non-member third parties demonstrates the compelling need for this Court to clarify the proper bounds of associational and third-party standing. This Court should therefore grant certiorari and reverse the judgment below to make clear that injury-in-fact remains an essential constitutional requirement applicable to every litigant attempting to invoke the jurisdiction of the federal courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 00-3403

PENNSYLVANIA PSYCHIATRIC SOCIETY,
Appellant,

v.

GREEN SPRING HEALTH SERVICES, INC.;
MAGELLAN HEALTH SERVICES, INC.; HIGHMARK, INC.;
KEYSTONE HEALTH PLAN WEST, INC.; KEYSTONE HEALTH
PLAN CENTRAL, INC.; KEYSTONE HEALTH PLAN EAST, INC.

(D.C. Civ. No. 99-cv-00937)

Argued Oct. 31, 2000.
Filed: Feb. 6, 2002.

Before: SCIRICA, NYGAARD and BARRY, Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

The Pennsylvania Psychiatric Society sued several managed health care organizations on behalf of its member psychiatrists and their patients. The gravamen of its complaint was that the managed health care organizations impaired the quality of health care provided by psychiatrists to their patients by refusing to authorize necessary psychiatric

treatment, excessively burdening the reimbursement process and impeding other vital care.

The principal issue on appeal is whether the Pennsylvania Psychiatric Society has properly pleaded associational and third-party standing. Finding the Society would require significant individual participation to establish its member psychiatrists' claims, the District Court dismissed its complaint for lack of associational standing.[1] The District Court also found the Society's member psychiatrists lacked third-party standing to pursue their patients' claims. As an alternative ground for dismissal, the District Court held the mandatory arbitration provision in the psychiatrists' contracts barred the Society from advancing their members' claims in court.

We believe the District Court's dismissal under Fed.R.Civ.P. 12(b)(6) was premature. For this reason, we will vacate and remand for further proceedings.

I.

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 because certain claims asserted by the Pennsylvania Psychiatric Society arose under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461.[2] We have jurisdiction under 28 U.S.C. § 1291.

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[1] The District Court adopted the Magistrate Judge's Report and Recommendation in full.

[2] The case was removed from state court under ERISA's civil enforcement provision, § 502(a)(1)(b), which preempts state court jurisdiction for claims by a plan participant "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B); *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 66, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987); *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 56, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987).

To discern which claims are preempted, "we embraced a distinction between claims pertaining to the quality of the medical benefits provided to a plan participant [that is, not preempted] and claims that the plan participant was entitled to, but did not receive, a certain quantum of benefits under his or her plan [that is, preempted]." *In re*

II.

The Pennsylvania Psychiatric Society, a nonprofit corporation representing licensed psychiatrists in Pennsylvania, filed suit on behalf of its member psychiatrists and their patients who subscribe to managed health care plans administered by Green Spring Health Services.

There are several defendants. Green Spring Health Services, Inc. provides a network of psychiatrists as well as administrative services for managed health care plans; Magellan Health Services, Inc. is its corporate parent. Keystone Health Plan West, Inc., Keystone Health Plan Central, Inc., and Keystone Health Plan East, Inc. are health maintenance organizations that contract with Green Spring Health Services to provide mental health and substance abuse services to their subscribers. Highmark, Inc. is the parent company of Keystone Health Plan West (these managed care organizations collectively are referred to as "the MCOs"). Green Spring Health Services, Magellan Health Services and

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U.S. Healthcare, Inc., 193 F.3d 151, 162 (3d Cir. 1999) (citing *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 357-58 (3d Cir. 1995)), *cert. denied sub nom., U.S. Healthcare, Inc. v. Bauman*, 530 U.S. 1242, 120 S.Ct. 2687, 147 L.Ed.2d 960 (2000). Explaining this distinction in the Supreme Court's lexicon, we recently restated our position that "challenges [to] the administration of or eligibility for benefits [i.e., quantity] ... fall[] within the scope of § 502(a) and [are] completely preempted...." *Pryzbowski v. U.S. Healthcare, Inc.*, 245 F.3d 266, 273 (3d Cir. 2001). To this end, claims against HMO policies that purportedly delay care "fall within the realm of the administration of benefits." *Id.*

On behalf of its members' patients, the Pennsylvania Psychiatric Society alleges the MCOs implemented policies to discourage or prevent subscribers from using mental health services. Under § 502(a), "[r]elief may take the form of accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits." *Dedeaux*, 481 U.S. at 53, 107 S.Ct. 1549. In this case, the relief sought involves the administration of benefits, because it would change the quantum of mental health services provided. These allegations fall within the scope of ERISA's civil enforcement provision, and, therefore, removal was proper as ERISA completely preempts at least some of the claims alleged by the Pennsylvania Psychiatric Society on behalf of its members' patients.

Highmark choose which psychiatrists to credential to provide these services.

Green Spring Health Services administers the psychiatric and substance abuse services for the employee benefit plans provided by the health management organizations. For this purpose, it enters into contracts with psychiatrists (the "Provider Agreement") to form a provider network to service the plans. In particular, the Provider Agreement assures that Green Spring Health Services will not undermine the psychiatrists' responsibility to provide patients with the mental health services they require. For most disputes arising between credentialed psychiatrists and Green Spring Health Services, the Provider Agreement also contains a mandatory arbitration clause that requires exhaustion of internal review procedures before seeking binding arbitration.

Alleging the MCOs unfairly profit at the expense of the psychiatrists and their patients, the Pennsylvania Psychiatric Society asserts several tort and breach of contract claims for impeding necessary psychiatric treatment. The Pennsylvania Psychiatric Society contends the MCOs refused to authorize and provide reimbursement for medically necessary mental health treatment; interfered with patients' care by permitting non-psychiatrists to make psychiatric treatment decisions; violated Provider Agreements by improperly terminating relationships with certain psychiatrists; and breached the contractual duties of good faith and fair dealing by failing to timely pay psychiatrists and by referring patients to inconvenient treatment locations, thereby depriving some patients access to treatment.

On the basis of these allegations, the Pennsylvania Psychiatric Society claims the MCOs tortiously interfered with the psychiatrists' livelihood as well as the psychiatrist-patient relationship. In addition, the Society asserts the MCOs fraudulently misrepresented the quality of care their plans would provide to subscribers and the benefits psychiatrists would receive for providing their services. Finally, on behalf of its members' patients, the Society alleges the MCOs made false representations to their subscribers in violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Const. Stat. Ann. § 201-1 *et seq.* (West 2001).

The complaint sought declaratory relief, injunctive relief, and damages. The Pennsylvania Psychiatric Society does not appeal the dismissal of its damages claims.

The suit commenced in state court but was removed to federal court on grounds that ERISA preempted all or, at least, some of the Society's claims. Recommending dismissal, the Magistrate Judge issued a Report and Recommendation finding the Society lacked standing to assert the claims of its members and their patients. As an alternative ground for dismissal, the Magistrate Judge found the mandatory arbitration clause in the psychiatrists' contracts foreclosed advancing the claims in court. The District Court adopted the Magistrate Judge's Report. The Pennsylvania Psychiatric Society timely appealed.

III.

The Pennsylvania Psychiatric Society's ability to press the claims of its members and their patients initially hinges on whether it meets the constitutional requirements for associational standing. For its part, the Society seeks only to pursue claims on behalf of its members and their patients; it does not allege direct injury to itself.

Our review of a dismissal under Fed.R.Civ.P. 12(b)(6) for lack of standing is plenary. *ACLU-NJ v. Township of Wall*, 246 F.3d 258, 261 (3d Cir. 2001); *Gen. Instrument Corp. v. Nu-Tek Elecs. & Mfg., Inc.*, 197 F.3d 83, 86 (3d Cir. 1999). On appeal, we must accept as true all material allegations of the complaint and draw all reasonable inferences in a light most favorable to plaintiff. *Maio v. Aetna, Inc.*, 221 F.3d 472, 481-82 (3d Cir. 2000). "'The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)). Therefore, we may affirm the district court only if we believe that the association would be entitled to no relief under any set of facts consistent with its allegations. *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 434-35 (3d Cir. 2000); *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 262 n. 12 (3d Cir. 1998).

A.

To satisfy the "case or controversy" standing requirement under Article III, § 2 of the United States Constitution, a plaintiff must establish that it has suffered a cognizable injury that is causally related to the alleged conduct of the defendant and is redressable by judicial action. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (discussing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)); *The Pitt News v. Fisher*, 215 F.3d 354, 359 (3d Cir. 2000). Associations may satisfy these elements by asserting claims that arise from injuries they directly sustain. *See, e.g., Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 299 n. 11, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). Absent injury to itself, an association may pursue claims solely as a representative of its members. *See, e.g., New York State Club Assn, Inc. v. City of New York*, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988); *Pub. Interest Research Group of NJ, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir. 1997). By permitting associational standing, we "recognize[ ] that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Brock*, 477 U.S. 274, 290, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986); *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Jackson, J., concurring) (noting purpose of joining an association "often is to permit the association ... to vindicate the interests of all").

The Supreme Court has enunciated a three-prong test for associational standing. An association must demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (permitting state agency that represented apple industry to challenge North Carolina statute); *see also Laidlaw Envtl. Servs.*, 528 U.S. at 181, 120 S.Ct. 693; *Hosp. Council v. City of Pittsburgh*, 949 F.2d 83, 86 (3d Cir. 1991).

The need for some individual participation, however, does not necessarily bar associational standing under this third criterion. *Hospital Council,* 949 F.2d at 89-90.

In this case, the MCOs concede the Pennsylvania Psychiatric Society satisfies *Hunt*'s first and second prongs. But echoing defendants' objections, the District Court found the psychiatrists' claims would require a level of individual participation that precludes associational standing. As noted, the Society has not appealed the dismissal of its damages claims. This is noteworthy because damages claims usually require significant individual participation, which fatally undercuts a request for associational standing. On this point, the Supreme Court has explained that

> "[w]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind."

Hunt, 432 U.S. at 343, 97 S.Ct. 2434 (quoting *Warth v. Seldin,* 422 U.S. 490, 515, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). Because claims for monetary relief usually require individual participation, courts have held associations cannot generally raise these claims on behalf of their members. *E.g., Air Transp. Ass'n v. Reno,* 80 F.3d 477, 484-85 (D.C.Cir. 1996) (collecting cases); *Sanner v. Bd. of Trade,* 62 F.3d 918, 923 (7th Cir. 1995) (same). Specifically, the Supreme Court has counseled "that an association's action for damages running solely to its members would be barred for want of the association's standing to sue." *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 546, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996) (relying on *Hunt,* 432 U.S. at 343, 97 S.Ct. 2434). Had the Society continued to press its claims for damages on appeal, dismissal under Rule 12(b)(6) would be entirely appropriate.

The sole associational standing question remains whether, taking the allegations as true, the Pennsylvania Psychiatric Society's requests for declaratory and injunctive relief will require an inappropriate level of individual participation.[3] We first addressed this question in *Hospital Council of Western Pennsylvania v. City of Pittsburgh,* where an association alleged that certain city and counties threatened to discriminate against nonprofit hospitals on taxation, zoning, and contract matters if the hospitals refused to make voluntary payments in lieu of taxes. 949 F.2d 83. Interpreting *Hunt*'s third prong through the prism of earlier Supreme Court jurisprudence, we rejected the city's argument that some individual participation violated this requirement.[4] *Id.* at 89. Explaining the circumstances on which this conclusion rested, we concluded:

> [T]he claims asserted by the Council would require some participation by some Council members. This case, unlike many prior associational standing cases, does not involve a challenge to a statute, regulation, or ordinance, but instead involves a challenge to alleged practices that would probably have to be proved by evidence regarding the manner in which the defendants treated individual member hospitals. Adjudication of such claims would likely require that member hospitals provide discovery, and trial testimony by officers and employees of member hospitals might be needed as well. Nevertheless, since participation by "each [allegedly] injured party" would not be necessary, we see no ground for denying associational standing.

Id. at 89-90.

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[3] Individual participation by an association's membership may be unnecessary when the relief sought is prospective (i.e., an injunction or declaratory judgment). *See Brock,* 477 U.S. at 287-88, 106 S.Ct. 2523; *Ark. Med. Soc'y, Inc. v. Reynolds,* 6 F.3d 519, 528 (8th Cir. 1993); *Action Alliance of Senior Citizens v. Snider,* No. Civ. A. 93-4827, 1994 WL 384990, at *3 (E.D.Pa. July 18, 1994) ("[P]articipation of individual members is rarely necessary when injunctive relief rather than individual damages is sought. *Hospital Council,* 949 F.2d at 89. This particularly true where ... a broad based change in procedure rather than individualized injunctive relief is sought.").

[4] In its brief, Keystone suggests reasons why individual participation would be required.

The Court of Appeals for the Seventh Circuit subsequently adopted our interpretation of *Hunt*'s third prong in *Retired Chicago Police Association v. City of Chicago,* where the Retired Chicago Police Association sued the city to bar implementation of increased health care premiums. 7 F.3d 584 (7th Cir. 1993). In this drawn-out litigation, the Retired Chicago Police Association represented city employees who allegedly had been guaranteed subsidized health coverage. When the city attempted to raise the coverage price because of escalating costs, the employees claimed the city reneged on its promise and sued. Believing the allegations would require individual participation, the district court concluded the association lacked standing. *Id.* at 600-01. Relying on *Hospital Council,* the court of appeals reversed and remanded, holding the association could attempt to establish its allegations with limited membership participation.[5] *Id.* at 602-03.

The MCOs argue the medical coverage decisions on psychiatric care and substance abuse services, which form the basis of the organization's allegations, are fact-intensive inquiries. For this reason, they assert the examination of medical care determinations will demand significant individual participation. To buttress this point, defendants note they offer subscribers various health care plans that in turn provide varying benefits. Consequently, they argue, demonstrating any single coverage decision violated their obligations will entail a case-by-case examination of a patient's condition along with the corresponding available benefits. In support, defendants rely on *Rent Stabilization Association v. Dinkins,* where an association of landowners alleged rent regulations constituted an unconstitutional taking of their property. 5 F.3d 591 (2d Cir. 1993). There, the Court of

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[5] The Court of Appeals for the Seventh Circuit stated:

> We believe that the approach of the Third Circuit is a sound one. We can discern no indication in *Warth, Hunt,* or *Brock* that the Supreme Court intended to limit representational standing to cases in which it would not be necessary to take any evidence from individual members of an association.... Rather, the third prong of *Hunt* is more plausibly read as dealing with situations in which it is necessary to establish "individualized proof," 432 U.S. at 344, 97 S.Ct. 2434, for litigants not before the court in order to support the cause of action. 7 F.3d at 601-02.

Appeals for the Second Circuit held that the extensive individual testimony required to adjudicate the claims would violate *Hunt*. *Id.* at 596; *see also Reid v. Dep't of Commerce,* 793 F.2d 277, 279-80 (Fed.Cir. 1986) (holding union lacked standing to assert back pay claims for its members because each claim depended on member's individual circumstances). The court reasoned the claims foreclosed standing because it

> would have to engage in an ad hoc factual inquiry for each landlord who alleges that he has suffered a taking. [The court] would have to determine the landlord's particular return based on a host of individualized financial data, and [the court] would have to investigate the reasons for any failure to obtain an adequate return, because the Constitution certainly cannot be read to guarantee a profit to an inefficient or incompetent landlord.

Rent Stabilization, 5 F.3d at 596. But the Court of Appeals for the Second Circuit has not rejected associational standing where only limited individual participation by some members would be required. *See N.Y. State Nat'l Org. for Women v. Terry,* 886 F.2d 1339, 1349 (2d Cir. 1989) (association warranted standing although evidence from some individual members necessary); *see also Nat'l Assn of Coll. Bookstores, Inc. v. Cambridge Univ. Press,* 990 F.Supp. 245, 249-50 (S.D.N.Y.1997). We agree that conferring associational standing would be improper for claims requiring a fact-intensive-individual inquiry.

The District Court reviewed the Pennsylvania Psychiatric Society's allegations—overly restrictive treatment authorizations; care determinations based on criteria besides medical necessity; creation of improper obstacles to physician credentialing; imposition of overly-burdensome administrative requirements; failure to pay psychiatrists for rendered services; direct interference with psychiatrist-patient relations—and found each assertion would necessitate significant individual participation. If this were true, the organization would not satisfy the associational standing requirements.[6]

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[6] Likewise, if the Pennsylvania Psychiatric Society continued to press damages claims on behalf of its members, it would not meet the requirements for associational standing. *See supra* p. 283.

But the Pennsylvania Psychiatric Society maintains the heart of its complaint involves systemic policy violations that will make extensive individual participation unnecessary. In effect, the Society contends the *methods* the MCOs employ for making decisions—e.g., authorizing or denying mental health services, credentialing physicians, and reimbursement—represent breaches of contract as well as tortious conduct. Therefore, insofar as its allegations concern *how* the MCOs render these decisions, the Society's complaint "involve[s][] challenge[s] to alleged practices," *Hospital Council,* 949 F.2d at 89, that may be established with sample testimony, which may not involve specific, factually intensive, individual medical care determinations. *See Virginia Hosp. Ass'n v. Baliles,* 868 F.2d 653, 663 (4th Cir. 1989), *aff'd on other grounds sub nom. Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990).

If the Pennsylvania Psychiatric Society can establish these claims with limited individual participation, it would satisfy the requirements for associational standing. While we question whether the Society can accomplish this, at this stage of the proceedings on a motion to dismiss for lack of standing, we review the sufficiency of the pleadings and "must accept as true all material allegations of the complaint and must construe the complaint in favor of the plaintiff." *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.,* 140 F.3d 478, 483 (3d Cir. 1998) (citing *Warth,* 422 U.S. at 501, 95 S.Ct. 2197). For this reason, we believe the Society's suit should not be dismissed before it is given the opportunity to establish the alleged violations without significant individual participation (as noted, if the damages claims remained, we would affirm the dismissal under Fed.R.Civ.P. 12(b)(6)). Moreover, as the organization concedes, if it cannot adequately demonstrate the MCOs' breaches with limited individual participation, its suit should be dismissed. Because this appeal arises on a motion to dismiss, the Pennsylvania Psychiatric Society should be allowed to move forward with its claims within the boundaries of associational standing. Therefore, we conclude that the District Court erred in dismissing the matter on this basis under Fed.R.Civ.P. 12(b)(6). Nevertheless, the District Court is free to revisit this issue.

B.

In addition to advancing the rights of its member psychiatrists, the Pennsylvania Psychiatric Society seeks to assert the claims of its members' patients who are also allegedly injured by defendants' practices. Because the patients are not members of, or otherwise directly associated with, the Pennsylvania Psychiatric Society, the Society does not have associational standing to assert their claims. Nonetheless, the Society maintains it may bring the patients' claims under the doctrine of third-party standing.[7] In particular, the Society contends its member psychiatrists have third-party standing to assert the claims of their patients, and the Society has standing to bring the claims of its members, including their third-party claims. Defendants have challenged both of these steps. Therefore, we must decide, first, whether the member psychiatrists have third-party standing to bring the claims of their patients, and second, whether the Pennsylvania Psychiatric Society has associational standing to assert these members' third-party claims.

1.

Apart from the constitutional requirements for standing,[8] courts have imposed a set of prudential limitations on the exercise of federal jurisdiction over third-party claims. *Bennett v. Spear,* 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) ("[T]he federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.") (quotation and citation omitted); *Warth,* 422 U.S. at 498, 95 S.Ct. 2197; *Powell v. Ridge,* 189 F.3d 387, 404 (3d Cir. 1999). The restrictions against third-party standing do not stem from the Article III "case or contro-

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[7] Third-party standing is also commonly known as *jus tertii* standing. *City of Chicago v. Morales,* 527 U.S. 41, 56 n. 22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999); *The Pitt News,* 215 F.3d at 362 n. 6; *see also* Henry Monaghan, *Third Party Standing,* 84 Colum. L. Rev. 277, 278 n. 6 (1984) (explaining *jus tertii* standing).

[8] Under standing doctrine, a plaintiff must satisfy three constitutional preconditions: (1) a cognizable injury that is (2) causally connected to the alleged conduct and is (3) capable of being redressed by a favorable judicial decision. *Lujan,* 504 U.S. at 560-61, 112 S.Ct. 2130; *see also supra* pp. 282-83.

versy" requirement, but rather from prudential concerns,[9] *Amato v. Wilentz*, 952 F.2d 742, 748 (3d Cir. 1991), which prevent courts from "deciding questions of broad social import where no individual rights would be vindicated and ... limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99-100, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979); *see also Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 955, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984).

It is a well-established tenet of standing that a "litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 538 (3d Cir. 1994). This principle is based on the assumption that "third parties themselves usually will be the best proponents of their own rights," *Singleton v. Wulff*, 428 U.S. 106, 114, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (plurality opinion), which serves to foster judicial restraint and ensure the clear presentation of issues. *See Munson*, 467 U.S. at 955, 104 S.Ct. 2839.

Yet the prohibition is not invariable and our jurisprudence recognizes third-party standing under certain circum-

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[9] The Supreme Court has consistently held that standing to assert third-party rights is a prudential matter:

> [O]ur decisions have settled that limitations on a litigant's assertion of jus tertii are not constitutionally mandated, but rather stem from a salutary "rule of self-restraint" designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative.

Craig v. Boren, 429 U.S. 190, 193-95, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *see also Brown Group*, 517 U.S. at 557, 116 S.Ct. 1529; *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); *Singleton v. Wulff*, 428 U.S. 106, 123-24, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (plurality opinion); *Warth*, 422 U.S. at 499, 95 S.Ct. 2197; *Barrows v. Jackson*, 346 U.S. 249, 255, 257, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953).

stances.[10] *Campbell v. Louisiana,* 523 U.S. 392, 397-98, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998); *see also Hodel v. Irving,* 481 U.S. 704, 711, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987) (acknowledging general rule that party must assert own interests is "subject to exceptions"). In particular, if a course of conduct "prevents a third-party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement," third-party standing may be appropriate. *United States Dep't of Labor v. Triplett,* 494 U.S. 715, 720, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990); *see also Munson,* 467 U.S. at 954-58, 104 S.Ct. 2839 (fundraiser had third-party standing to challenge statute limiting fees charitable organizations could pay because law infringed on organizations' right to hire fundraiser for a higher fee).

The Supreme Court has found that the principles animating these prudential concerns are not subverted if the third party is hindered from asserting its own rights and shares an identity of interests with the plaintiff. *See Craig,* 429 U.S. at 193-94, 97 S.Ct. 451; *Singleton,* 428 U.S. at 114-15, 96 S.Ct. 2868; *Eisenstadt v. Baird,* 405 U.S. 438, 443-46, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972). More specifically, third-party standing requires the satisfaction of three preconditions: 1) the plaintiff must suffer injury; 2) the plaintiff and the third party must have a "close relationship"; and 3) the third party must face some obstacles that prevent it from pursuing its own claims. *Campbell,* 523 U.S. at 397, 118 S.Ct. 1419; *Powers,* 499 U.S. at 411, 111 S.Ct. 1364; *The Pitt News,* 215 F.3d at 362. It remains for courts to balance these factors to

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[10] For instance, doctors may be able to assert the rights of patients; lawyers may be able to assert the rights of clients; vendors may be able to assert the rights of customers; and candidates for public office may be able to assert the rights of voters. *See, e.g., Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 109 S.Ct. 2646 (1989) (holding lawyer could bring Sixth Amendment lawsuit on behalf of criminal defendant); *Singleton,* 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (conferring standing on physicians on behalf of patients to challenge a statute that excluded funding for abortions from Medicaid benefits); *Craig,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (allowing vendor to challenge statute that prohibited males under age of twenty-one from buying beer); *Mancuso v. Taft,* 476 F.2d 187 (1st Cir. 1973) (permitting candidate for public office to raise voters' rights).

determine if third-party standing is warranted. *Amato,* 952 F.2d at 750.

a.

Although the Pennsylvania Psychiatric Society itself has not suffered direct injury, it is uncontested that it properly pleaded that defendants' policies and procedures have economically injured its member psychiatrists and undermined their ability to provide quality health care. Thus, while the Society does not itself stand in an appropriate relationship to the patients' claims to directly assert them, its members may have third-party standing to do so.[11] And because plaintiff seeks to establish standing on the basis of its members' standing to bring these claims, the members are the appropriate focus of inquiry for these purposes.

b.

We next turn to whether the psychiatrists and their patients have a sufficiently "close relationship" which will permit the physicians to effectively advance their patients' claims. To meet this standard, this relationship must permit the psychiatrists to operate "'fully, or very nearly, as effective a proponent'" of their patients' rights as the patients themselves.[12] *Powers*, 499 U.S. at 413, 111 S.Ct. 1364 (quoting *Singleton,* 428 U.S. at 115, 96 S.Ct. 2868).

The patients' relationships with their psychiatrists fulfills this requirement. *See supra* note 12. In *Singleton v. Wulff*, the Supreme Court granted physicians third-party standing on

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[11] The District Court held—and the dissent argues—that the Pennsylvania Psychiatric Society could not raise these claims because it did not itself suffer injury. Injury to the Society, however, is not relevant to the issue of the psychiatrists' standing to bring the patients' claims. Because of the Society's posture, that is the initial question to be resolved. Only after it is determined that the member psychiatrists would have third-party standing over these claims do we assess whether the Society can bring its members' third-party claims. It is in the latter context that injury to appellant itself is a potential requirement, which we discuss below.

[12] Courts have generally recognized physicians' authority to pursue the claims of their patients. *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh,* 737 F.2d 283, 290 & n. 6 (3d Cir. 1984) (collecting cases where physicians allowed to assert patients' claims); *see also Planned Parenthood v. Farmer,* 220 F.3d 127, 147 & n. 10 (3d Cir. 2000).

behalf of their patients to challenge a statute prohibiting Medicaid funding for certain abortions. 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826. Because of the inherent closeness of the doctor-patient relationship, the plurality found the physicians could efficaciously advocate their patients' interests. *Id.* at 117, 96 S.Ct. 2868 (noting "abortion decision is one in which the physician is intimately involved"). The relationship forged between psychiatrists and their patients is equally compelling.

Psychiatrists clearly have the kind of relationship with their patients which lends itself to advancing claims on their behalf. This intimate relationship and the resulting mental health treatment ensures psychiatrists can effectively assert their patients' rights. Because the Pennsylvania Psychiatric Society alleges the MCOs prevent patients from receiving necessary mental health services and psychiatrists from providing them, its member psychiatrists would be well-suited to litigate these claims for both parties, as their interests are clearly aligned. *See Amato,* 952 F.2d at 751 (noting doctor-patient relationship provides strong likelihood of effective advocacy by a physician on behalf of his patients). Accordingly, we believe the psychiatrist-patient relationship would satisfy the second criterion for third-party standing.[13]

c.

Finally, we examine whether the mental health patients face obstacles to pursuing litigation themselves. This criterion does not require an absolute bar from suit, but "some hindrance to the third party's ability to protect his or her own interests," *Powers,* 499 U.S. at 411, 111 S.Ct. 1364. In other words, a party need not face insurmountable hurdles to warrant third-party standing.[14] *Id.* at 415, 111 S.Ct. 1364

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[13] The importance of the psychiatrist-patient relationship has been recognized in other settings too. In *Jaffee v. Redmond,* the Supreme Court upheld the evidentiary privilege for psychotherapist-patient communications. 518 U.S. 1, 10-15, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996).

[14] One treatise insists that "cases do not demand an absolute impossibility of suit in order to fall within the [impediment] exception. At the other end of the spectrum, a practical disincentive to sue may suffice, although a mere disincentive is less persuasive than a concrete impediment." 15 James Wm. Moore et al., *Moore's Federal Practice* § 101.51 [3][c].

(holding excluded juror's limited incentive to bring discrimination suit satisfied obstacle requirement for criminal defendant to merit third-party standing); *Singleton,* 428 U.S. at 117, 96 S.Ct. 2868 (recognizing lawsuit's invasion of patient's privacy and "imminent mootness" of pregnancy sufficiently impeded patient from bringing suit herself). The District Court found the patients' mental health problems did not significantly hinder them from suing. We disagree.

The stigma associated with receiving mental health services presents a considerable deterrent to litigation. *Cf. Parham v. J.R.,* 442 U.S. 584, 622, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (Stewart, J., concurring) ("There can be no doubt that commitment to a mental institution results in massive curtailment of liberty. In addition to the physical confinement involved, a person's liberty is also substantially affected by the stigma attached to treatment in a mental hospital.") (quotations and citations omitted); *Humphreys v. Drug Enforcement Admin.,* 96 F.3d 658, 662 (3d Cir. 1996) (noting "psychiatric patients suffer a stigma in society") (quotation and citation omitted). For example, the Supreme Court recognized in *Singleton* that the obstacles confronted by women in opposing an abortion statute were not overwhelming. In fact, the Court acknowledged the suit could have been brought pseudonymously or as a class. *Singleton,* 428 U.S. at 117, 96 S.Ct. 2868. The Court still concluded that a woman's desire to protect her privacy could discourage her from bringing suit and constituted a sufficient impediment. *Id.* at 117-18, 96 S.Ct. 2868. These concerns apply with equal, if not greater, force to mental health patients. *See Bd. of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 375, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) ("There can be little doubt, then, that persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will.") (Kennedy, J., concurring). Besides the stigmatization that may blunt mental health patients' incentive to pursue litigation, their impaired condition may prevent them from being able to assert their claims. Therefore, we believe the patients' fear of stigmatization, coupled with their potential incapacity to pursue legal remedies, operates as a powerful deterrent to bringing suit.

Because the third-party claims asserted by the Pennsylvania Psychiatric Society do not implicate any constitutional rights of the psychiatrists' patients, the MCOs contend that granting third-party standing is unwarranted. While successful third-party standing claims have involved alleged violations of third parties' constitutional rights, *Singleton* and its progeny have not stipulated that constitutional claims are a prerequisite.[15] It is true that the rule against third-party standing "normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth,* 422 U.S. at 509, 95 S.Ct. 2197. Furthermore, the Supreme Court has noted that courts must consider "the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights; and the impact of the litigation on third-party interests." *Caplin & Drysdale,* 491 U.S. at 623 n. 3, 109 S.Ct. 2646. But the Court has not held that a constitutional claim must also be alleged, *see, e.g., Powers,* 499 U.S. at 410-11, 111 S.Ct. 1364, and absent further guidance, we will not impose this requirement. For these reasons, we hold the Pennsylvania Psychiatric Society's member psychiatrists would have third-party standing to assert the claims of their patients.

2.

The Pennsylvania Psychiatric Society contends it has standing to bring these third-party claims just as it has standing to bring its members' other claims under the doctrine of associational standing. Defendants maintain the patients' claims are too attenuated from the Society to permit derivative standing.

We decline to adopt a per se rule barring such derivative claims. The Supreme Court did not delineate in *Hunt* which types of claims associations could bring on behalf of their members, but rather simply held that "an association has standing to bring suit on behalf of its members" when the

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[15] Simply raising a third party's constitutional claims will not in and of itself satisfy the requirements for third-party standing. For instance, a litigant may not assert a third party's Fourth Amendment rights against unreasonable search and seizure to prevent the admission of damaging evidence. *E.g., United States v. Payner,* 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980); *see also* Monaghan, *supra* note 7, at 305 n. 149.

requisite elements are established. *Hunt,* 432 U.S. at 343, 97 S.Ct. 2434.

The limitations on derivative standing, therefore, are to be determined by applying the test for associational standing specified in *Hunt*. Our holding that the Pennsylvania Psychiatric Society has alleged facts sufficient to establish the third-party standing of its members to bring their patients' claims implies the satisfaction of only the first requirement of the *Hunt* test—that "its members would otherwise have standing" to bring these claims. A third-party claim must also meet the requirements that "the interests it seeks to protect are germane to the organization's purpose" and that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* These factors inform the analysis whether an association stands in the correct relationship to a claim to allow it to assert that claim on behalf of others.

Other courts of appeals have adopted this approach in finding standing in similar cases. In *Fraternal Order of Police v. United States,* the Court of Appeals for the District of Columbia granted an organization derivative authority to assert the third-party claims of its members. 152 F.3d 998, 1002 (D.C.Cir. 1998) ("[T]he presence of [the chief law enforcement officers] as members gives the Order standing to make these [third-party] claims as well.").[16] The Fraternal Order of Police sued to contest the constitutionality of federal legislation that prohibited supplying firearms to police officers convicted of domestic violence. *Id.* at 1000-01. Because a chief law enforcement officer would be liable for supplying a firearm to a subordinate convicted of domestic violence and because the failure to supply a weapon could also violate the subordinate officer's rights, the court of appeals found the chiefs had third-party standing to advance the claims of their officers. *Id.* at 1002. Since the chiefs were members of the Fraternal Order of Police, the association had standing to advance the chiefs' claims as well as the

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16 The opinion containing the discussion of standing in Fraternal Order of Police was reversed on rehearing. *Fraternal Order of Police v. United States,* 173 F.3d 898 (D.C.Cir. 1999). In the second opinion, however, the court stated, "The analysis of standing on this issue is unchanged from our prior opinion." *Id.* at 903.

claims of their subordinates. Similar to this case, none of the members were themselves party to the suit.[17]

The Court of Appeals for the Sixth Circuit also granted an organization derivative authority to enjoin the enforcement of a statute requiring private schools to administer proficiency tests in *Ohio Association of Independent Schools v. Goff*, 92 F.3d 419, 421-22 (6th Cir. 1996). As parties to the litigation, the association's member schools had standing because failure to comply with the statute would result in the loss of their school charters. *Id.* at 422. The private schools also had third-party standing to assert the constitutional right of their students' parents to direct their children's education. Because its member schools could be injured by the statute, the Ohio Association of Independent Schools also had standing to assert their claims. Since its member schools had standing to assert the rights of the parents, the court held the Ohio Association of Independent Schools also had standing to sue on behalf of the parents whose children attended its members' schools. *Id.* ("The member schools ... have standing ... on behalf of parents of students who are threatened with the nonreceipt of diplomas. Consequently, the OAIS itself, as an organization dedicated exclusively to advancing the interests of the member schools, has associational standing to challenge the statutes at issue."). Thus, while some member schools—the intermediate parties—were parties to the dispute, the Sixth Circuit's standing analysis did not rely on that fact. We see a compelling analogy between these cases and the claims before us, and believe the Pennsylvania Psychiatric Society may have standing to assert its members' third-party claims.

The District Court found the Pennsylvania Psychiatric Society lacked derivative authority to pursue the claims of its members' patients because it had not suffered direct injury itself. On this point, defendants contend *Goff* is inapt because the Court of Appeals for the Sixth Circuit did not require that the association suffer injury in fact. *See Amato,* 952 F.2d at 749. This criticism is misplaced. It is generally true that

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[17] Contrary to the dissent, we believe *Fraternal Order of Police* supports recognition of the combination of associational standing and third-party standing, since the standing "bridge" in that case—the chief law enforcement officers—were not parties to the litigation.

third-party standing requires the party who advances the interests of another party to also suffer discrete injury. As noted previously, this prudential requirement sharpens presentation of claims and avoids litigation of general grievances. But when an association, which has not sustained direct injury, obtains standing to pursue the claims of its members, the association may rely on the injuries sustained by its members to satisfy the injury-in-fact requirement. Consequently, once an organization's members establish third-party standing, the prudential concerns are alleviated if the association also has authority to assert its members' claims.

It is a well-recognized anomaly of representational standing that the individuals who have sustained the requisite injury to satisfy the constitutional and prudential standing criteria are not in fact responsible for bringing suit. So long as the association's members have or will suffer sufficient injury to merit standing and their members possess standing to represent the interests of third-parties, then associations can advance the third-party claims of their members without suffering injuries themselves.[18] If on remand the Pennsylvania Psychiatric Society warrants associational standing to represent its members, we conclude it also may have derivative authority to raise the claims of its members' patients.[19]

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[18] In *Public Citizen v. FTC,* the Court of Appeals for the District of Columbia held Public Citizen and other organizations had standing to challenge an FTC regulation exempting certain promotional items from a statutory requirement that all advertisements for smokeless tobacco products carry certain health warnings. 869 F.2d 1541 (D.C.Cir. 1989). The court held the organizations had associational standing to assert the claims of their members. *Id.* at 1550. Additionally, the court held that members who were also parents had standing to advance claims for their children. The organizations thus had the derivative authority to assert the claims of their members' children as well. *Id.*

[19] Because the District Court held the Pennsylvania Psychiatric Society did not have standing to assert the claims of its members' patients, it found the organization itself did not fall within the "zone of interests" of the common law fraud or statutory fraud claims asserted on behalf of the psychiatrists' patients. Because we reverse and remand the District Court's judgment on associational and third-party standing, it will have to reconsider this issue.

IV.

We now consider the arbitration provision in the Provider Agreement between the MCOs and the psychiatrists.[20] The Pennsylvania Psychiatric Society argues that the District Court erred in holding all its claims were subject to mandatory arbitration. The Society contends the arbitration provision should not apply to its member psychiatrists for several reasons: (1) the arbitration provision is an unconscionable contract of adhesion; (2) the organization's broad-based claims are beyond the scope of the arbitration provision; (3) claims regarding the process of determining medical

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[20] The Provider Agreement provides in part:

> Section 10.1 Resolution of Disputes. In the event that a dispute between Green Spring and Provider arises out of or is related to this Agreement, the parties to the dispute agree to negotiate in good faith to attempt to resolve the dispute. In the event the dispute is not resolved within 30 days of the date one party sent written notice of the dispute to the other party, and if any party wishes to pursue the dispute, it shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association.... If the dispute pertains to a matter which is generally administered in accordance with Green Spring's procedures involving, for example, credentialing or quality assurance, the procedures set forth by Green Spring must be fully exhausted by Provider before Provider may invoke its right to arbitration under this Section.
>
> Provider acknowledges that the recommendation and determination of whether Health Services are Medically Necessary shall be made in accordance with Green Spring's policies and procedures and shall not be subject to this Section 10.

The Provider Agreement defines Medically Necessary Health Services as:

> Health Services including professional services and supplies rendered by a Provider to identify or treat an illness that has been diagnosed or is suspected, and which are: (a) consistent with (i) the efficient diagnosis and treatment of a condition; and (ii) standards of good medical practice; (b) required for other than convenience; (c) the most appropriate supply or level of service; (d) unable to be provided in a more cost-effective and efficient manner; and (e) unable to be provided at a facility providing a less intensive level of care. When applied to inpatient care, the term means: The needed care cannot be safely given on other than an inpatient basis.

necessity fall outside the purview of arbitration and pursuing these claims through the available internal review procedures would be futile; and (4) the psychiatrists with initial credentialing or re-credentialing claims do not have contracts with the MCOs requiring arbitration.[21]

Because it denied the Society associational and third-party standing to advance the claims of its members' patients, the District Court did not examine whether the patients' claims would be subject to mandatory arbitration. The District Court only reviewed the effect of the arbitration provision on the credentialed psychiatrists who are Society members. It strikes us that, assuming the Society has standing to assert the claims of each party, the District Court will have to re-examine the scope as well as the effect of the arbitration provision on all the parties involved. Because we find the Pennsylvania Psychiatric Society survives a motion to dismiss for lack of standing, the District Court must sort through, in the first instance, the impact of the psychiatrists' arbitration clause on the alleged claims.

V.

We will reverse and remand the dismissal of the Pennsylvania Psychiatric Society's complaint for lack of standing. Depending on the level of individual participation necessary to demonstrate its claims, the Society may have standing to press the claims of its member psychiatrists and their pa-

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[21] The District Court believed that these claims had all been settled, but the Pennsylvania Psychiatric Society maintains in its brief that these claims have not been addressed completely. Keystone also argues the association should be prohibited from asserting claims on behalf of psychiatrists that Green Spring Health Services has never credentialed because their claims are not present in the Pennsylvania Psychiatric Society's Amended Complaint. *See Pa. ex. rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988). In addition, defendants contend that the Pennsylvania Psychiatric Society has not asserted a single claim in its complaint on behalf of psychiatrists who have been denied credentialing by defendants. However, several of the allegations in the organization's amended complaint could arguably be read as asserting claims on behalf of this class of psychiatrists. Although the Amended Complaint is somewhat ambiguous, all these claims may be found woven throughout the allegations.

tients. Of course, we express no opinion as to the merits of any of the claims or defenses.

We will reverse the order of the District Court and remand for proceedings consistent with this opinion.

NYGAARD, Circuit Judge, dissenting:

I agree with much of what the majority has said. I part company, however, with its conclusion that grants PPS a hybrid-type of third-party derivative standing. PPS argues that it has standing to litigate, not the interests of its member-psychiatrists, but rather the issues and interests of its member-psychiatrists' patients—who are three steps removed from PPS. PPS's argument has three premises. Its first two premises are exceptions to the standing rule: 1) that PPS has associational standing to litigate on behalf of its member-psychiatrists; and, 2) that its member-psychiatrists have third-party standing to litigate on behalf of their patients. Its third premise is that these exceptions can be "stacked" to concoct a new exception to the standing rule. PPS thus concludes that it should have standing to litigate on behalf of its members' patients.

The first two premises are sound, but I disagree with the majority on the third. PPS cannot piggy-back two discrete *exceptions,* to swallow up the long-standing *rule* that litigants must assert their own rights and interests. I cannot find, nor does PPS cite, any authority for stacking or piggy-backing these relationships into an attenuated concatenation of exceptions to the standing rule so as to confer standing on PPS. I would hold that PPS cannot seek relief based upon the rights and interests of remote third parties. I must therefore respectfully dissent on this point.

Central to my conclusion is that PPS's third premise runs afoul of *Amato v. Wilentz,* 952 F.2d 742 (3d Cir. 1991), wherein we discussed the objectives and standards for third-party standing. Although third-party standing typically proves to be a nebulous prudential doctrine, sensitive to the particularities and peculiarities of the relationship between the parties and their claims, we distilled a basic test for third-party standing in *Amato. Id.* at 748-49. We require that the party seeking standing must first have suffered an injury in fact. If the party seeking standing has suffered an injury in

fact, the court must then examine further, considering: a) the intimacy of the relationship between the parties; b) any impediment the party might have to advancing its own rights; and c) the identity of the interests between the parties. *Id.* at 749.

Applying the *Amato* standards, the District Court first found that PPS did not itself suffer an injury. No one disputes this fact. I agree with the District Court that because PPS has not even alleged a concrete injury to itself, it cannot satisfy *Amato*'s most elementary standard. Standing should be denied to PPS on this test alone.

The District Court, however, continued and found that even if PPS had alleged an injury in fact to itself, *Amato*'s subsequent elements, or balancing tests, would not favor PPS third-party standing for its members' patients. The District Court found that the "relationship between PPS and the patient subscribers is so attenuated as to weigh against PPS to bring suit on behalf of persons with which it has no direct relationship." The District Court next found that "there appears to be no impediment to the patients seeking to enforce their legal claims themselves" and the patients face "no affirmative obstacle to sue[]." I agree with the District Court that even had PPS shown an injury-in-fact, the subsequent balancing test would not confer standing on PPS. The argument that psychiatric patients may face some impediment to bringing these claims themselves, because of the stigma attached to mental illness and psychiatric care, is mere speculation, and moreover, this factor is counterbalanced by the remoteness of the relationship between PPS and its members' patients. The relationship between PPS and the patients is nothing like the doctor/patient intimacy that supports that exception to the standing rule.

Thus the District Court held that PPS should be denied third-party standing for its member' patients for three distinct reasons: 1) PPS suffered no injury in fact and therefore the Court did not need to entertain the secondary balancing factors set forth in *Amato*; 2) even if PPS did merit consideration under the balancing test, the balancing test would not weigh in favor of granting standing since PPS's relationship with its members' patients is too attenuated; and 3) the patients have no substantial obstacle to bringing their claims independently. I agree with all three reasons, and

independently. I agree with all three reasons, and with the District Court's conclusion.

PPS argues to us that the District Court "ignored significant case law recognizing derivative third-party standing." Nonsense. None of the cases PPS cites are directly on point. PPS and its *amici* cite cases that confer standing to doctors to litigate on behalf of their patients. But this does nothing to advance PPS' argument on the "stacking" issue presented here. PPS cites both *American College of Obstetricians v. Thornburgh,* 737 F.2d 283 (3d Cir. 1984) and *Ohio Association of Independent Schools v. Goff*, 92 F.3d 419 (6th Cir. 1996), to support the notion that "an association may assert third-party claims that could be brought by its members." Neither of these cases stand for such a notion.

In *Ohio Association,* the association, along with several of its member schools, sought standing for parents of children in the schools to challenge the requirement of state formulated testing in private schools. *Ohio Association,* 92 F.3d at 421. The Court found that the "OAIS *member schools* also have standing to assert the constitutional right of parents to direct their children's education." *Id.* at 422 (emphasis added). Thus the Court did not find that the association had standing to assert parents' interests, but that individual schools had standing to do so. Thus the operative distinction between *Ohio Association* and PPS' argument is that in *Ohio Association* both the association and its individual members *jointly* brought the suit, but here, PPS attempts to bring its claims to court without the participation of *any* of its members.

American College presents the same problems for PPS. In *American College*, the challenge was brought by a team of an association, doctors, and medical providers. *American College,* 737 F.2d at 289. In a footnote the Court stated that the "district court concluded that plaintiff physicians, AGOG, and medical providers all had standing to raise their own interests (or the interests of members) and those of patients and customers in challenging the Act's constitutionality. We affirm this general conclusion." *Id.* at 290 n. 6. As in *Ohio Association,* the standing questions in *American College* turned on the doctors actually participating in the suit. The reason is obvious: The doctors provide the standing "bridge" between the association and the patients. All of the support

cited in *American College* demonstrates the need for physicians to participate in the suit to establish standing. *Id.* (citing *City of Akron v. Akron Ctr. for Reprod. Health,* 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) (challenge by abortion clinics and a physician); *Planned Parenthood Ass'n v. Ashcroft,* 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983) (challenge by Planned Parenthood, two physicians and an abortion clinic); *Planned Parenthood v. Danforth,* 428 U.S. 52, 62, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) (challenge by Planned Parenthood and two physicians); *Singleton v. Wulff,* 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (challenge by two physicians)).

Other cases demonstrate this need for a caretaker, such as a parent or advising officer, to be a party to the suit to provide the bridge between the association and the harmed individual. *See Fraternal Order of Police v. United States,* 152 F.3d 998 (D.C.Cir. 1998) (granting standing for an organization whose members included chief law enforcement officers based on the chief law enforcement officer's standing to advance the equal-protection rights of subordinate officers); *Public Citizen v. FTC,* 869 F.2d 1541 (D.C.Cir. 1989) (organizations had standing to challenge an FTC regulation that exempted certain promotional items from the requirement that advertising for smokeless tobacco products carry health warnings, since the members of the organizations included parents of children who might be injured by the lack of warnings).

In summary, I agree with the manner in which the District Court applied the *Amato* standard. I am convinced that PPS has neither successfully met (nor circumnavigated, as the case may be) *Amato*'s requirement that PPS must have itself suffered an injury. Hence I respectfully dissent and would affirm the District Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 99-937

PENNSYLVANIA PSYCHIATRIC SOCIETY,
Plaintiff,

v.

GREEN SPRING HEALTH SERVICES, INC., MAGELLAN HEALTH SERVICES, INC., HIGHMARK, INC., KEYSTONE HEALTH PLAN WEST, INC., KEYSTONE HEALTH PLAN CENTRAL, INC., AND KEYSTONE HEALTH PLAN EAST, INC.,
Defendants.

MEMORANDUM ORDER

On June 16, 1999, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(A) and (B), and Local Rule 72.1.3.

The magistrate judge's report and recommendation, filed on February 15, 2000, recommended that defendants' motions to dismiss the amended complaint (Docket #33 and #36) be granted, and that plaintiff's motion for preliminary injunction (Docket #42) be denied as moot. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all counsel by first-class mail on February 15, 2000. Objections were filed by plaintiff on March 2, 2000 (Docket #50), and on March 15, 2000, defendants filed a joint response to plaintiff's objections

(Docket #52). After *de novo* review of the pleadings and documents in the case, together with the report and recommendation, objections and response thereto, the following order is entered:

AND NOW, this 24th day of March, 2000,

IT IS HEREBY ORDERED that defendants' motions to dismiss the amended complaint (Docket #33 and Docket #36) are granted, and that plaintiff's motion for preliminary injunction (Docket #42) is denied as moot.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated February 15, 2000 (Docket #49), is adopted as the opinion of the court.

/s/_____

GARY L. LANCASTER
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 99-937

PENNSYLVANIA PSYCHIATRIC SOCIETY,
Plaintiff,

v.

GREEN SPRING HEALTH SERVICES, INC., MAGELLAN HEALTH SERVICES, INC., HIGHMARK, INC., KEYSTONE HEALTH PLAN WEST, INC., KEYSTONE HEALTH PLAN CENTRAL, INC., AND KEYSTONE HEALTH PLAN EAST, INC.,
Defendants.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. *RECOMMENDATION*

It is respectfully recommended that defendant's motions to dismiss the amended complaint (Docket # s 33 and 36) be granted, and that plaintiff's motion for preliminary injunction (Docket # 42) be denied as moot.

II. *REPORT*

This is an action filed by a non-profit, voluntary association, the Pennsylvania Psychiatric Society (PPS), which has as its members certain licensed psychiatrists who practice in the Commonwealth of Pennsylvania. PPS purports to sue on behalf of some of its members who have, it is alleged, been damaged by the actions of defendants. PPS also asserts

claims on behalf of patients, and potential patients, of its member psychiatrists.

Defendant Green Spring Health Services (Green Spring) provides a network of psychiatrists and administrative services to managed health care plans. Magellan Health Services (Magellan) is the corporate parent of Green Spring. Defendants Highmark Inc., Keystone Health Plan West, Inc., Keystone Health Plan Central, Inc., and Keystone Health Plan West, Inc. (collectively referred to as the "HMOs") are health management organizations which contract with Green Spring for the provision of mental health and substance abuse related benefits.

The contractual relationships among the parties are as follows. The HMOs provide health care benefits primarily through employee benefit plans. Green Spring administers the provision of behavioral health and substance abuse services under contract to the HMOs, and provides a network of psychiatrists to service the mental health/substance abuse components of health plans (the Provider Network). The contracts between the HMOs and Green Spring are known as Managed Care Service Agreements. Individual psychiatrists contract with Green Spring pursuant to Provider Participation Agreements through which individual psychiatrists agree to render mental health and/or chemical dependency treatment service to individuals covered by benefit plans. The subscribers to HMO plans receive treatment from the psychiatrists through the plan offered by their HMO, as administered by Green Spring.

The amended complaint in this case sets forth several allegedly improper actions taken by Green Spring and the HMOs which, it is alleged, are designed to maximize their profits at the expense of PPS members and of the HMO subscribers. PPS alleges that this profit maximization is accomplished by the following means: "(1) refusing to credential physician applicants [to the Provider Network], or creating insurmountable obstacles to physician credentialing ([Amended Complaint] ¶¶ 38-44); (2) imposing overly-burdensome administrative requirements that make providing timely, medically appropriate treatment to patient-subscribers virtually impossible (*Id.*, ¶¶ 45-48, 63-65); (3) failing to pay PPS-member psychiatrists for services rendered, or delaying payments for 'clean claims' beyond the 45-day time limit

imposed by section 2166 of the Quality Health Care Accountability and Protection Act (¶¶ 49-51); (4) interfering directly with physician-patient relations (*Id.* ¶¶ 52-53, 74-76); (5) impermissibly discriminating against PPS-member psychiatrists based on profit-driven criteria, their practice specialty, and their geographic location (*Id.* ¶¶ 54-62, 77-79); (6) giving overly-restrictive treatment authorizations that undermine the quality of care received by patient-subscribers (¶¶ 63-70); and (7) making determinations concerning the level and quality of care received by patient-subscribers based on arbitrary criteria that are not based upon medical necessity. (¶¶ 71-73)." (Docket # 39 at 6-7). PPS further alleges that these administrative practices have placed some patient-subscribers in mortal danger, and caused needless suffering by others. PPS further alleges that its members have suffered "financial and professional detriment" from Green Spring's alleged practices. PPS seeks equitable relief to "reform defendants' flawed policies" and "ancillary damages" suffered by PPS members and patient-subscribers (Docket # 39 at 7).

The amended complaint is in eight counts. In Count I, PPS alleges that defendants have breached their contractual obligation to authorize and provide reimbursement for medically necessary and appropriate treatment by directly refusing to provide such authorization, and by imposing administrative burdens that prevent the provision of such care. PPS seeks a declaration that defendants have violated the terms of the Provider Agreements, and also seeks monetary damages.

Counts II and III also allege breaches of the Provider Agreements. In Count II, PPS alleges that defendants have interfered with PPS-member psychiatrists' obligation to render services "within the applicable standard of care" (Docket # 39 at 8). In Count III, a breach is alleged due to the termination of certain PPS-members in a manner inconsistent with the Provider Agreements. PPS seeks declaratory relief with at both counts, but monetary damages only at to Count II.

PPS alleges a breach of the contractual duty of good faith and fair dealing in taking the above-described actions, and seeks both declaratory and monetary relief.

In Count V, PPS alleges that defendants interfered with its members' relationships with their clients. Count VI is a claim of tortious interference with the physician-client relationship in that defendants have attempted to influence the subscribers' willingness to seek treatment from PPS member psychiatrists. PPS seeks declaratory and monetary relief at Counts V and VI.

PPS alleges in Count VII that defendants fraudulently misrepresented both the quality and level of care available under their plans. These misrepresentations were allegedly made to both patient-subscribers and to PPS-member psychiatrists who joined the Provider Network. Declaratory and injunctive relief is requested on behalf of PPS members and patient-subscribers, as well as monetary damages.

The final count, Count VIII, is brought on behalf of patient-subscribers for false representations which, it is alleged, violate the provisions of Pennsylvania Unfair Trade Practices and Consumer Protection Law "UTPCPL", 73 P.S. § 201-1. PPS seeks damages on behalf of the patient-subscribers.

Defendants filed motions to dismiss asserting that PPS lacks standing, and that the claims must be heard in arbitration as set forth in the Provider Agreements (Docket # s 19, 21, 23, and 25). PPS filed an amended complaint (Docket # 29) which the court concluded mooted these motions. Defendants have again filed motions to dismiss (Docket # s 33 and 36), this time addressed to the amended complaint, and again raising the same standing and arbitration arguments. Defendants have also filed briefs in support of their motions (Docket # s 34 and 37). PPS has responded (Docket # 39), the motions were argued, and the motions are now ripe for disposition.

STANDING TO MAKE CLAIMS FOR PPS MEMBERS

The initial question posed by defendants' motions to dismiss is whether PPS has standing to raise the claims presented in this case. PPS does not allege that it has suffered harm and, hence, it may sue only if it satisfies the test set forth in *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 343 (1977):

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

For purposes of the motions to dismiss, defendants concede that the first two prongs of the *Hunt* test are met. Defendants assert, however, that the amended complaint fails to allege facts which would permit a court to find that PPS has standing to assert claims on behalf of its members. In this respect, the court is obligated to apply the familiar standard for Rule 12(b)(6) review, i.e., the court must accept as true all material allegations and construe the compliant in the light most favorable to the complaining party. *Hospital Council of Western Pennsylvania v. City of Pittsburgh,* 949 F.2d 83, 86 (3d Cir. 1991).

The third prong of the test for associational standing can be broken down into two parts. The first part addresses the need for participation by association members in proving the claims, while the second part is addressed to involvement by individual association members in establishing damages. "[C]laims for monetary relief necessarily involve individualized proof and thus the individual participation of association members, thereby running afoul of the third prong of the *Hunt* test." *United Union of Roofers, Waterproofers, and Allied Trades No. 40 v. Insurance Corporation of America,* 919 F.2d 1398, 1400 (9th Cir. 1990). Indeed, courts have routinely held that associations may not bring claims for monetary relief on behalf of their members. *Sanner v. Board of Trade of City of Chicago,* 62 F.3d 918, 923 (7th Cir. 1995) (collecting cases). In this case, PPS seeks monetary damages on behalf of its members with respect to the claims made in Counts I, II, IV, V and VI. Each of these claims necessarily will involve individual proof of damage and, hence, each claim runs afoul of the third prong of the *Hunt* test.[1]

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[1] PPS notes that the third prong of the *Hunt* test has been deemed "jurisprudential" rather than being of "constitutional magnitude" as are the first two prongs. *Food and Commercial Workers v. Brown Group, Inc.*, 517 U.S. 544, 556-58 (1996). In *Brown Group,* this conclusion

PPS argues that individual participation in the proof of breach of contract and damages can be presented without participation by individual PPS members. The court disagrees. Accepting as true the allegations of the complaint that certain types of claims are systematically rejected or are systematically approved for less treatment than is called for by the applicable standard, this inquiry will necessarily involve descriptions of the particular diagnoses and treatment which are assertedly being denied by defendants.

Further, it is not enough for PPS to argue, as it does, that the claims for monetary relief are "secondary" or "ancillary" to the requests for declaratory and injunctive relief. This is so because even if the sole claims made by PPS sought non-monetary relief, the third prong would nonetheless prevent PPS from making its member's claims for them.

Where an association's request for declaratory or injunctive relief does not require participation by its members, the courts have allowed the claims to be made by an association. *Hospital Council,* 949 F.2d at 89. In fact, in *Hospital Council,* the Court of Appeals for the Third Circuit rejected an argument premised upon the third prong of the *Hunt* test because "[n]either the district court nor the defendants have explained why the declaratory and injunctive relief sought by the Council in this case would have required participation by individual Council members." *Id.* Thus, the mere fact that monetary damages are not at issue is not enough, of itself, to satisfy the third prong. "Even when an association requests an injunction, the claim it asserts may be such that it cannot be resolved on an association-wide basis." *NACS v. Cambridge University Press,* 990 F.Supp. 245, 248 (S.D.N.Y.1997).

In this case, PPS asserts a variety of alleged breaches of the contracts between its members and the defendants. It is alleged that defendants have: refused to credential physician applicants; created insurmountable obstacles to physician

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permitted a finding that Congress was able to, and did, abrogate this requirement with respect to WARN Act claims brought by Unions on behalf of their members. Here, however, PPS makes claims sounding in breach of contract and tort as to which no Congressional abrogation of the final prong of the *Hunt* test has occurred. Hence, PPS's reliance upon *Brown Group* is misplaced.

credentialing; imposed overly-burdensome administrative requirements; failed to timely pay PPS-member psychiatrists for services rendered; interfered directly with physician-patient relations; discriminated against PPS-member psychiatrists based on profit-driven criteria; given overly-restrictive treatment authorizations; and made determinations concerning the level and quality of care received by patient-subscribers based on criteria other than medical necessity. Each of these asserted improper actions on the part of defendants requires participation by the individual PPS member who applied for credentialing, made the diagnosis for which treatment was not approved, or applied for benefits which were not timely paid. It may be, as PPS asserts, that it seeks "broad-based changes" in the procedures utilized by Green Springs. In order, however, to prove that such "broad based" changes are warranted, PPS will have to establish that the alleged abuses occurred. To do this, proof of specific instances of the types of asserted improper conduct will be necessary. Hence, PPS lacks standing to sue on behalf of its members, since proof of the claims, and of the damages suffered, will necessarily entail the involvement in this litigation of PPS members.

STANDING TO MAKE CLAIMS ON BEHALF OF PATIENTS

Defendants also challenge PPS's standing to assert claims on behalf of patients who have been treated by, or who may in the future be treated by, PPS's member psychiatrists. In this respect, it would be inappropriate to apply the test for associational standing since none of the patients is a member of PPS. *Amnesty America v. County of Allegheny,* 822 F.Supp. 297 (W.D.Pa.1993) (no associational standing where alleged injured parties are not members of plaintiff association); *Pharmaceutical Association v. Commonwealth of Pennsylvania, DPW,* 542 F.Supp. 1349 (W.D.Pa.1982) (association of pharmacists could not make claims on behalf of member's customers). PPS defines the individuals it purports to represent as "persons who subscribed to managed care plans offered in the Commonwealth of Pennsylvania, which are administered by Green Spring and Magellan, and/or who are patients of PPS-member psychiatrists." (Docket # 39 at 4). The court interprets this as including patients or potential patients of PPS members who are

subscribers to HMOs which utilize Green Spring as a managed care provider. As set forth above, PPS purports to raise claims of fraud under both common law and pursuant to the UTPCPL on behalf of these "patient-subscribers."

Third-party standing exists when the plaintiff itself has suffered concrete injury, and consideration of other factors weigh in favor of permitting the plaintiff to raise claims on behalf of a non-litigant. *Amato v. Wilentz*, 952 F.2d 742, 749 (3d Cir. 1991). The "concrete injury" requisite satisfies Article III requirements, while the remaining considerations are prudential in nature, and are weighed in a balancing test. *Wheeler v. Travelers Insurance Co.*, 22 F.3d 534, 537 (3d Cir. 1994) (standing involves both the "case and controversy" requirements of Article III and other prudential concerns). These factors are: (1) the potential conflicts of interest between the litigant and the third party; (2) any obstacles to suit by the third party; and (3) the closeness of the relationship between the litigant and the third party. *Id.*

In this case, PPS does not allege that it has itself suffered concrete injury. PPS alleges, instead, that its members have suffered such injury. Thus, at most, PPS has alleged that its individual members may meet the concrete injury requirement for third-party standing with respect to their patients. PPS has not, however, alleged facts from which the court can find that PPS itself has such standing. Thus, PPS cannot meet the preliminary requirement for third party standing, and the claims made on behalf of the patient-subscribers must be dismissed.

Even, however, if the court proceeded to the balancing test for third party standing, this would not benefit PPS. Although there are no apparent conflicts of interest between PPS and the patient-subscribers it seeks to represent, there appears to be no impediment to the patients seeking to enforce their legal claims themselves. Individual patients who believe that they are not receiving the benefits for which they have contracted are faced with no "affirmative obstacle to suing" and, further, they have "practical incentive to sue" since it is they who suffer the alleged denial of needed treatment. *Amato*, at 751.[2]

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[2] PPS asserts that patients seeking mental health and/or drug abuse treatment will be reluctant to sue due to the stigma attached to mental

Further, the court finds that the "relationship" between PPS and the patient-subscribers is so attenuated as to weigh against permitting PPS to bring suit on behalf of persons with which it has no direct relationship. PPS has no standing to litigate any claims on behalf of patients of PPS-member psychiatrists.

PRUDENTIAL STANDING

Defendants assert that principles of prudential standing, considered apart from the existence of Article III standing, also support their motion to dismiss. "No single formula is capable of answering every prudential standing question." *Conte Brothers Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 225 (3d Cir. 1998). There are three considerations which are "typically invoked" in considering whether a party has satisfied the test for prudential standing: "(1) that a litigant 'assert his own legal interests rather than those of third parties,' (2) that courts 'refrain from adjudicating abstract questions of wide public significance which amount to generalized grievances,' and (3) that a litigant demonstrate that the asserted interests are arguably within the 'zone of interests' intended to be protected by the statute, rule or constitutional provision on which the claim is based." *Id.*, at 226. *Citing, Wheeler, supra,* 22 F.3d at 538.

First, with respect to the entire lawsuit, defendants argue that PPS is attempting to litigate the rights of third parties, and not rights which it possesses. The court agrees. "[T]he first step in satisfying prudential standing is for the litigant to demonstrate that it has asserted its own legal interests rather than those of third parties." *UPS Worldwide Forwarding v. United States Postal Service,* 66 F.3d 621, 627 (3d Cir. 1995). In this case, PPS has no legal right of its own which it seeks to vindicate. Thus, even if the requirements of Arti-

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health and substance abuse problems. This, however, is not the type of "affirmative obstacle" to which the *Amato* court is referring. There is no legal impediment to suit by the patients. Nor is the stigma attached to the type of treatment sought an "affirmative obstacle" to suit. Instead, it is, at most, a disincentive to suit. The court finds this argument unpersuasive, particularly since PPS alleges that defendants have placed some patients in mortal danger. *See, e.g., Amato,* 952 F.2d at 751 (disincentive to sue must be overwhelming to equal "affirmative obstacle" to suit).

cle III were satisfied, prudential considerations would mandate that the motions to dismiss be granted in this case.

Further, even if PPS and some interest of its own upon which it was suing, it would not meet the "zone of interest" test identified above with respect to the claims asserted on behalf of patient-subscribers. Here, the "rule or statute" sued upon with respect to the subscribers in Count VII is a common law fraud claim. PPS is not within the "zone of interests" which the common law seeks to protect by granting to patient-subscribers a claim of fraud against defendants. This conclusion applies as well to the claim in Count VIII premised upon Pennsylvania's UTPCPL. Nothing in that statute grants to PPS any interest whatsoever. Hence, no interest of PPS may be said to be within the zone of interests protected by the common or statutory law relied upon.[3]

The court is not convinced that PPS has brought claims which are mere "generalized grievances." While this case is pregnant with issues constituent to the ongoing public debate concerning managed health care, it is framed upon the contractual relationship between PPS members and the defendants. Hence, the court cannot, on the face of the pleadings, determine that the true issue here is a generalized grievance concerning managed care.

MANDATORY ARBITRATION

Defendants also assert that each of the claims raised by PPS would be the subject of mandatory arbitration if brought by individual PPS members. Hence, the individual members of the Provider Network should not be permitted to circum-

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[3] The UTPCPL provides that suit may be filed by a "person who purchases or leases goods or services". 73 Pa.C.S. § 201-9.2. Here, the persons entitled to sue under the statute are clearly the patients who subscribed to the HMO. No Pennsylvania court has permitted a non-party to a contract to sue on behalf of consumers under the UTPCPL. PPS's argument that Pennsylvania law permits suit on behalf of consumers by a party with "valid representative capacity" proves too much. PPS cites to *Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators, Inc*, ___ Pa.Super. ___, 574 A.2d 641, 645 (1990). In *Forge Towers*, a condominium association itself contracted with the defendant on behalf of its members. Hence, the condominium association had standing since it was a party to the contract. Here, no comparable situation exists.

vent the arbitration provision by having their claims brought by an association of which they are members, but which itself is not party to the Provider Agreements. The court notes at the outset that avoidance of an arbitration provision by suing through a surrogate is simply not an appropriate use of associational standing. "Under the Federal Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone Memorial Hospital v Mercury Construction Corporation*, 460 U.S. 1, 20 (1983). *See also, Isidor Paiewonsky v. Sharp Properties*, 998 F.2d 145, 155 (3d Cir. 1993) (citing cases where arbitration agreement upheld even though rights of non-parties to arbitration would be effected). Here, it cannot be more clear that any arbitration agreement which binds the individual members of PPS would likewise be binding upon PPS suing in a representational capacity.

The Provider Agreements pursuant to which PPS members participate in Green Spring's Provider Network each contain an identical arbitration provision:

> Resolution of Disputes. In the event that a dispute between Green Spring and Provider arises out of or is related to this Agreement, the parties to the dispute agree to negotiate in good faith to attempt to resolve the dispute. In the event the dispute is not resolved within 30 days of the date one party sent written notice of the dispute to the other party, and if any party wishes to pursue the dispute, it shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association.... If the dispute pertains to a matter which is generally administered in accordance with Green Spring's procedures involving, for example, credentialing or quality assurance, the procedures set forth by Green Spring must be fully exhausted by Provider before Provider may invoke its right to arbitration under this Section. Provider acknowledges that the recommendation and determination of whether Health Services are Medically Necessary shall be made in accordance with Green Spring's policies and procedures and shall not be subject to this Section 10.

(Docket # 29, Exhibit D at § 10.1(a)).

The arbitration provision, by its express terms, applies to all manner of credentialing disputes, as well as to matters involving quality of care. Likewise, issues of payment to providers are matters which necessarily fall within the provision as involving matters arising from the contract. Thus, PPS may not raise any claims premised upon these matters in this court. Instead, PPS members must proceed to arbitration on such claims.

PPS makes several arguments against application of the arbitration provision. First, PPS argues that the provision was not meant to encompass "broad-based, systemic challenges" to defendants' polieies, procedures and practices. The claims in this case, however, sound in breach of contract and tort. The arbitration provision expressly includes disputes arising under the Provider Agreements. Further, the tort claims raised in this case may fairly be said to relate to the performance, or not, of the parties' contractual obligations. Thus, all of the claims raised by PPS relate to and arise under the Provider Agreements. Hence, this argument is not persuasive.

Second, PPS argues that matters concerning the determination of medical necessity are not included within the arbitration provision. While this is true, this case also involves claims premised upon late payments, credentialing and (for want of a better term) administrative requirements which manifestly do not involve determinations of medical necessity. Again, this court cannot address claims which, at least in part, must first proceed to arbitration.

Third, PPS argues that it brings claims on behalf of members who have been refused credentialing and, hence, who are not parties to a Provider Agreement. The court has been informed by the parties during a status conference that each of the PPS members who had difficulty with Green Springs' credentialing process have now been credentialed and approved by Greens Springs. This argument appears to be moot.

Fourth, PPS argues that resort to Green Springs' internal review process for medical necessity claims would be futile since those claims could not be brought collectively as they have been here, but would instead be reviewed on a case-by-case basis. There is no allegation in the amended complaint

that any PPS member has in fact resorted to Green Springs' review procedure and found that procedure unavailing. Allegations of futility in this case cannot be credited. Indeed, PPS does not argue that its members are unable to raise their claims, instead, PPS argues that each claim will be addressed individually during the review procedures, and that PPS would prefer to bring them collectively in this forum. Perceived convenience in one forum is not proof of futility in another.

Finally, PPS asserts that the contract is one of adhesion because PPS-member psychiatrists had no choice but to enter into the agreement to arbitrate, and that they "cannot exercise their right to arbitrate for fear of retaliatory termination by Green Spring." Thus, it is further asserted that the arbitration clause provides a "sham" remedy, and that this court can choose not to enforce it. The court has the power to invalidate an agreement to arbitrate where the party challenging the contract lacked a meaningful choice in accepting the provision and the arbitration provision unreasonably favors the party asserting it. *Harris v. Green Tree Financial Corporation,* 183 F.3d 173, 181 (3d Cir. 1999). PPS has alleged facts sufficient to establish the first prong of the test, but fails to do so with respect to the second.

The arbitration provision is, on its face, neither more nor less favorable to Green Springs than it is to PPS members. PPS seeks to establish the second prong of the test by alleging that Green Spring's right to terminate provider agreements with 90 days notice and without cause[4] makes the arbitration provision a sham since Green Springs can terminate any provider who actually pursues his or her right to arbitration. PPS does not allege, however, that any such terminations have either occurred or been threatened. The court will not assume, as it has been invited to do, that a party to a contract will exercise its rights thereunder in a vindictive fashion, and will not invalidate an arbitration agreement on the basis that such action is possible.

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[4] The Provider Agreements give both Green Springs and the provider the right to so cancel the agreement.

CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that defendants' motions to dismiss the amended complaint (Docket # s 33 and 36) be granted, and that plaintiff's subsequently filed motion for preliminary injunction (Docket # 42) be denied as moot.

In accordance with the Magistrate's Act, 28 U.S.C. Section 636(b)(1)(B) and (C), and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to timely file objections may constitute a waiver of any appellate rights.

/s/_____
Kenneth J. Benson
United States Magistrate Judge

Dated: February 15, 2000

APPENDIX D

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 00-3403

PENNSYLVANIA PSYCHIATRIC SOCIETY,
Appellant,

v.

GREEN SPRING HEALTH SERVICES, INC.;
MAGELLAN HEALTH SERVICES, INC.; HIGHMARK, INC.;
KEYSTONE HEALTH PLAN WEST, INC.; KEYSTONE HEALTH
PLAN CENTRAL, INC.; KEYSTONE HEALTH PLAN EAST, INC.

(D.C. Civ. No. 99-cv-00937)

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge,
SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH,
McKEE, BARRY, AMBRO and FUENTES, Circuit Judges.

The petition for rehearing filed by appellees Green Spring Health Services, Inc. and Magellan Health Services, Inc. and the petition for rehearing filed by appellees Highmark, Inc., Keystone Health Plan West, Inc., Keystone Health Plan Central, Inc. and Keystone Health Plan East, Inc. in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

regular service not having voted for rehearing, the petitions for rehearing by the panel and the Court en banc, are denied.

BY THE COURT,

/s/_____
Anthony J. Scirica
Circuit Judge

Dated: March 11, 2002

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

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479-3011

June 4, 2002

Mr. John G. Roberts
Hogan & Hartson
555 13th Street, NW
Washington, DC 20004

Re: Green Spring Health Services, Inc. et al.
v.
Pennsylvania Psychiatric Society
Application No. 01A943

Dear Mr. Roberts:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on June 4, 2002, extended the time to and including July 10, 2002.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By: /s/
Clayton R. Higgins, Jr.
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

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479-3011

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Supreme Court, U.S.
FILED
AUG 14 2002
OFFICE OF THE CLERK

No. 02-65

IN THE

Supreme Court of the United States

GREEN SPRING HEALTH SERVICES, INC., *et al.*,

Petitioners,

v.

PENNSYLVANIA PSYCHIATRIC SOCIETY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent Pennsylvania Psychiatric Society is a Pennsylvania non-profit corporation. No publicly held company holds more than 10% of its stock.

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INTRODUCTION

Challenging only a portion of the Third Circuit's ruling below, Petitioners make two arguments why the single issue they raise warrants review. First, Petitioners simply reargue the standing argument that the Third Circuit rejected below. Petitioners have had to acknowledge that there is no split among the circuits because the courts of appeals that have considered the third-party standing issue raised here agree with the Third Circuit. Petitioners' bare assertion of error by the court below is neither a compelling nor an appropriate basis upon which to seek this Court's review.

Perhaps aware of the weakness of their first argument, Petitioners go beyond what they presented below and attempt to create an issue here of constitutional stature. They assert that the complaint filed by Respondent Pennsylvania Psychiatric Society ("PPS") challenges core practices of managed care and attempts to legislate reform, not adjudicate a resolution of an active dispute. This argument mischaracterizes the fundamental nature of PPS' claims which, in the context of Fed. R. Civ. P. 12, is defined by the Amended Complaint. The gravamen of this litigation is Petitioners' misrepresentation and breach of their contractual commitments to physicians with whom they have Provider Agreements and the resulting injury to the physicians' patients. PPS is not seeking to legislate new managed care practices, but only to require Petitioners to implement managed care policies in a manner consistent with their agreements and applicable law. Because Petitioners' newly-minted second argument is based upon claims not asserted here, it also fails as a rationale for Supreme Court review.

The Petition should therefore be denied because neither of Petitioners' arguments warrant the Court's consideration.

COUNTERSTATEMENT OF THE CASE

PPS brought this action to address Petitioners' systematic practice of refusing to authorize, and otherwise restricting, medically necessary and appropriate mental and behavioral health care, in violation of Pennsylvania law, NCQA ("National Committee for Quality Assurance") accreditation standards, and defendant Green Spring's Provider Agreements with PPS-member psychiatrists, and misrepresenting the quality of care provided to subscribers of Petitioners' health plans. Amended Complaint, Introduction. Respondent's Appendix ("Resp. App.") at 1a-2a. Petitioner-defendants are managed care organizations ("MCOs") doing business in the Commonwealth of Pennsylvania. *Id.* at 3a-5a. Green Spring and Magellan supply behavioral health and substance abuse services, as well as credential physicians to provide such services, under contract to managed care organizations. *Id.* at 3a. They are alleged to participate in the administrative processes and procedures at issue in this lawsuit. *Id.* at 6a-7a.

Highmark is a non-profit corporation that operates a health service plan, and engages in the administrative processes and procedures at issue in this lawsuit, including credentialing of physicians to Green Spring's Provider Network, determining the quality and level of care provided by PPS-member psychiatrists and reimbursement of physicians for services provided. *Id.* at 4a. The Keystone defendants, Keystone Health Plan West, Keystone Health Plan Central, and Keystone Health Plan East, are Pennsylvania health maintenance organizations that operate the managed care plans at issue in this lawsuit. *Id.* at 4a-5a. Highmark is the parent company, and principal, of Keystone Health Plan West. *Id.* at 4a-5a.

The Keystone defendants contract with Green Spring to obtain mental and behavioral health and substance abuse services. *Id.* at 7a. Green Spring, in turn, contracts with psychiatrists (the "Provider Agreement") and other behavioral health care providers to form the "Provider Network" that actually renders treatment to Subscribers of the managed care plans. *Id.* at 9a. Among other things, the Provider Agreement requires PPS-member psychiatrists to furnish medically necessary and appropriate services within the applicable standard of care, and guarantees that Green Spring's policies and procedures will not interfere with their ability to do so. *Id.*

Petitioners represent that certain levels of care will be available under their managed care plans, and that decisions to deny care can be freely appealed. *Id.* at 13a. In reality, however, they routinely and systematically violate contractual, common-law and statutory obligations to authorize PPS-member psychiatrists to provide medically necessary substance abuse and behavioral and mental health services. *Id.* at 14a. Such violations interfere with PPS-member psychiatrists' ability to practice psychiatry within the applicable standard of care, and directly jeopardize the mental health and welfare of their patients. *Id.* at 11a.

Petitioners' abusive administrative policies and procedures have endangered suicidal patient-subscribers by denying or delaying vital in-patient care, and have caused needless suffering to other subscribers by denying them access to medically necessary and appropriate health services. *Id.* at 25a-27a. In addition, PPS-member psychiatrists have suffered financial and professional detriment as a result of Green Spring's and the other Petitioners' practices designed to restrict their ability to provide medically necessary and

appropriate treatment. *Id.* at 14a-27a. PPS, accordingly, brought this lawsuit, asserting breach of contract and state law tort claims on behalf of its member physicians as well as their patients, seeking equitable relief from defendants' improper policies, procedures and practices. PPS' Amended Complaint states eight Counts, the first six on behalf of PPS' members, *id.* at 30a-42a and the last two on behalf of both PPS' members and their patients. *Id.* at 42a-45a.

The district court dismissed all of PPS' claims on the basis that the Society lacked standing to represent its members and, *a fortiorari*, its members' patients. Alternatively, the district court held that PPS' claims were subject to arbitration under the Provider Agreements. The Third Circuit reversed the district court's finding that PPS lacked standing as to both PPS' members and their patients, and remanded for further proceedings consistent with its opinion. *Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc., et al.*, 280 F.3d 278 (3d Cir. 2002), Petitioners' Appendix ("Pet. App.") at 23a. Petitioners' petition for rehearing and rehearing en banc was denied. Pet. App. at 44a.

Before the Third Circuit, Petitioners Highmark and the Keystone Defendants argued that PPS lacked both associational and third-party standing, that its claims fell under a mandatory arbitration provision or a grievance procedure, and that all of PPS' claims were preempted by ERISA. Their standing arguments were principally prudential, not constitutional. Similarly, Petitioners Green Spring and Magellan argued that PPS lacked associational standing due to the need for individual participation of its members, that PPS failed to meet the requirements for third-party standing, that the claims are subject to mandatory

arbitration or grievance procedures, that PPS failed to state any claims for failure to credential or re-credential physicians, and that PPS' claims were preempted by ERISA.

Petitioners' standing arguments were rejected by the Third Circuit with the full panel agreeing that the district court had erred in dismissing PPS' claims asserted on behalf of its members. Review of that determination is not being sought before this Court. The majority also reversed the district court's dismissal of PPS' members' patients' claims, addressing in response to Petitioners' arguments only the prudential standing issues, and not the separation of powers argument Petitioners attempt to make here.

REASONS FOR DENYING THE WRIT

I. Petitioners' Attempt To Reargue Standing Does Not Merit Review

Petitioners' first argument, while carefully couched in terms of a "conflict," is no more than reargument of the standing issues they lost before the Third Circuit. Pet. at 9-18. While Petitioners insist that the Third Circuit's decision below implicates concerns of constitutional stature, the preliminary nature of this fact-bound matter, the absence of any conflict among the courts of appeals that have addressed the issue, and the fact that the Third Circuit's resolution of the issue is entirely consistent with this Court's standing jurisprudence confirm that Petitioners simply object to the result. An asserted challenge to an appellate court's application of established law is neither a compelling nor appropriate basis upon which to seek this Court's review. *See* Supreme Court Rule 10.

A. Review Is Premature At This Early Stage Of A Fact-Bound Case

This matter is still at a preliminary stage, with all proceedings having occurred on Petitioners' Rule 12 motions. The only operative facts are those alleged in PPS' Amended Complaint which must be deemed to be true. *Albright v. Oliver*, 510 U.S. 266, 268 (1994); Pet. App. at 11a. All inferences must be drawn in favor of the nonmoving party. *H.J. Inc v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989). "[W]hen standing is challenged on the basis of the pleadings, we 'accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party.'" *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

The Third Circuit recognized the prematurity of the lower court's dismissal, stating that "the society's suit should not be dismissed before it is given the opportunity to establish the alleged violations without significant individual participation . . . ," and so "should be allowed to move forward with its claims within the boundaries of associational standing." Pet. App. at 11a. The court therefore reversed and remanded so that PPS might factually establish its standing and prove its claims.

As PPS conceded at argument, *id.*, there exists a possibility that it will not be able to demonstrate that Petitioners' systemic practices will support PPS' claims without the need for its individual members' participation. Should that possibility materialize, PPS will likely lose its right to represent its members in this lawsuit. Because PPS' standing to represent its members' *patients* — the only issue

raised here — relies on PPS' associational standing to represent its members, the issue presented here could become moot. Where the underlying factual development could obviate the need to resolve the issue as presented, certiorari is not appropriate. *Board of License Commissioners of the Town of Town of Tivertown v. Pastore*, 469 U.S. 238, 240 (1985) (dismissing writ of certiorari as moot, "[s]uch speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide."), *quoting DeFunis v. Odegaard*, 416 U.S. 312, 320 n.5 (1974).

B. There Is No Split Of Authority

Petitioners openly concede, Pet. at 22-23, that their position is contrary to the uniform rulings of other courts of appeals to consider this issue. These courts have similarly held that an entity rightfully asserting organizational standing has the same standing to sue on behalf of third parties that its members would otherwise enjoy. In *Fraternal Order of Police v. United States*, 152 F.3d 998 (D.C. Cir. 1998), *cert. denied*, 528 U.S. 928 (1999), the Fraternal Order of Police sued to dispute the constitutionality of federal legislation that prohibited the supply of firearms to police officers convicted of domestic violence. Because chief law enforcement officers would be liable for supplying a firearm to a subordinate convicted of domestic violence, and because failure to supply a firearm would violate the subordinate's rights, the court found the chiefs had third-party standing to raise their subordinate's claims. *Id.*, 152 F.3d at 1001-1002. The "presence of [chief officers] as members," although not parties to the litigation, "[gave] the Order standing to make these claims as well." *Id.*, 152 F.3d at 1002.

In *Ohio Association of Independent Schools v. Goff*, 92 F.3d 419, 422 (6th Cir. 1996), *cert. denied*, 520 U.S. 1104 (1997), the court affirmed the derivative standing of a school association in a suit challenging a statute providing for the revocation of private school charters for failure to administer the same proficiency test as public high schools. Reasoning that the association had associational standing to raise the claims of its member schools, who in turn had third-party standing to raise the constitutional rights of parents to direct their children's education, the court held that the association had standing to raise the parents' claims. Likewise, in *Public Citizen v. Federal Trade Commission*, 869 F.2d 1541 (D.C. Cir. 1989), the court affirmed the standing of Public Citizen and other organizations to challenge exemptions to the health-warning requirements of the Smokeless Tobacco Act. Since the associations had standing to raise the claims of their members, and those members who were parents had standing to raise the claims of their children who would not receive the necessary health-warnings, the court held that the associations had "derivative authority to pursue actions on the parents' behalf." *Id.*, 869 F.2d at 1550.

The Third Circuit considered these opinions in light of this Court's standing jurisprudence. Pet. App. at 18a-21a. Contrary to Petitioners' apocalyptic suggestions, the Third Circuit merely "decline[d] to adopt a per se rule barring such derivative claims," Pet. App. at 18a; it did not create an exception that swallows the rule. The D.C. Circuit handed down its opinion in *Public Citizen* in 1989. Since then, the sky has not fallen, nor have the floodgates opened. Four consistent decisions in thirteen years do not demonstrate a "recurring," Pet. at 23, question justifying review.

C. The Third Circuit's Decision Is A Correct Application Of Existing Standing Principles.

The unanimous conclusions of these four courts of appeals regarding organizational and third-party standing is, not surprisingly, consistent with this Court's standing jurisprudence. Associational standing was recognized in *Warth v. Seldin*:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury . . . of the sort that would make out a justiciable case had the members themselves brought suit. . . . So long as this can be established . . . the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

422 U.S. 490, 511 (1975). In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), the Court held that an association acquires the standing of those whose interests it represents when:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 343.

The Third Circuit found that these three factors were all satisfied here. Pet. App. at 6a-11a. Nothing in any of this Court's associational standing decisions supports Petitioners' claim that — even though all of the *Hunt* factors are present — an organization's standing should nevertheless be less than the standing of the individuals on whose behalf it has filed suit. Instead, in *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 9-10 (1988), this Court specifically endorsed the "stacking" or representative standing challenged by Petitioners.

In *New York Club*, the plaintiff was an association of associations seeking to assert the First Amendment rights of the members of its members. *Id.* at 8-9. The defendant challenged the plaintiff's standing based upon the "in their own right" language of the first prong of the *Hunt* test and argued that the plaintiff could not avail itself of two levels of representative standing. 487 U.S. at 9. The Court rejected this argument, holding that once associational standing was established under *Hunt*, the plaintiff had the same standing as its members, including any standing those members had to represent the rights of others:

> [Defendant's] reading of *Hunt* is incorrect. Under *Hunt*, an association has standing to sue on behalf of its members when those members would have standing to bring the same suit. It does not matter what specific analysis is necessary to determine that the members could bring the same suit.

487 U.S. at 9. The Court in *New York Club* thus allowed what Petitioners here refer to as "stacking," Pet. at 2-3, the simultaneous assertion of two levels of representational standing:

> In this regard, it is sufficient to note that appellant's member associations would have standing to bring this same suit on behalf of their own individual members. . . . Thus this case is properly before us.

487 U.S. at 9-10, *citing Warth*, 422 U.S. at 511.

The only distinction between *New York Club* and this case is the particular type of representational standing at issue. In *New York Club* two levels of associational standing were permitted, whereas here the Third Circuit allowed one level of associational standing and one level of third-party standing. This is a distinction without a difference.

Associational and third-party standing are merely different "strands" of the "doctrine of representational standing," a doctrine that "rests on the premise that in certain circumstances, particular relationships are sufficient to rebut the background presumption that litigants may not assert the rights of absent third parties." *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557 (1996) (parentheticals omitted). Since the Court already determined, in *New York Club*, that a second level of representational standing is permissible, the minor permutation here in types of representational standing is not worthy of this Court's review — the "specific analysis" that the Court in *New York Club* held did "not matter." 487 U.S. at 9

Under *New York Club*, the only remaining issue is whether PPS's member psychiatrists have standing to assert claims on behalf of their patients that their patients' health care is being compromised by the defendants. This is not a

matter in serious dispute. Petitioners do not seriously contest that the doctor/patient relationship is a sufficient basis for third-party standing, and this Court has recognized the standing of physicians to represent their patients in health-care related litigation on several occasions. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 440 n.30 (1983);[1] *Singleton v. Wulff*, 428 U.S. 106, 114-116 (1976) (doctor-patient relationship sufficiently close to support *jus tertii*); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 62 (1976) (physicians have standing to raise rights of patients); *Doe v. Bolton*, 410 U.S. 176, 188-89 (1973) (same).

Thus, the Third Circuit correctly found that the psychiatrist-patient relationship satisfied the criteria for third-party standing. Pet. App. at 15a-16a. Petitioners have presented nothing more than a disagreement with the Third Circuit's application of established law to the facts of this case, which is neither a compelling nor an appropriate basis for seeking this Court's review.

II. Petitioners' Second Argument Was Not Raised Below And Is Based Upon A Mischaracterization Of PPS' Claims.

Petitioners also argue that the question of derivative standing raises "an important and recurring issue of separation of powers that should be decided by this Court."

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1. *City of Akron* was overruled on other grounds in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881 (1992) (overruling *Akron* "to the extent it find[s] a constitutional violation when the government requires . . . the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus").

Pet. at 18. Not only did Petitioners fail to raise their separation of powers argument below, but their argument is based on a fundamental mischaracterization that PPS' claims are an attack on managed care generally and an attempt to legislate a resolution. Because Petitioners failed to raise the argument below, the Third Circuit had no occasion to consider or address it. Moreover, PPS' actual claims, addressed as they are to Petitioners' specific conduct and not to managed care in general, do not threaten to legislate managed care such that separation of powers concerns are implicated. The Petition, accordingly, should be denied as to this argument as well.

A. Petitioners' Constitutional Arguments Were Not Pressed Below.

"It is this Court's practice to decline to review those issues neither pressed nor passed upon below." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990) (citation omitted). "'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'" *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). Before the Third Circuit, Petitioners briefed and argued the issue of third-party standing largely on prudential standing issues. The Court of Appeals accordingly decided it on those grounds. Pet. App. at 18a - 19a.

The constitutional issue that Petitioners failed to develop in the lower court proceedings therefore does not justify this Court's review.

> [W]e have said that "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]." These principles help to maintain the integrity of the process of certiorari.

Taylor v. Freeland & Kronz, 503 U.S. 638, 645-46 (1992) (quoting *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curiam*)). Thus, this Court "ordinarily 'do[es] not decide in the first instance issues not decided below.'" *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, __, 122 S. Ct. 511, 514 (2001) (quoting *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999)).[2]

This is not an "exceptional case," *Youakim*, 425 U.S. at 234, justifying deviation from the ordinary rule. While Petitioners now insist that vital Article III and separation of powers interests hang in the balance, Petitioners gave the Article III issue short shrift as it related to third-party standing, and further failed even to raise separation of powers before the Third Circuit. The Third Circuit, accordingly, noting that this Court has "consistently held that standing to assert third-party rights is a prudential matter," Pet. App. at 13a n.9, *citing Craig v. Boren*, 420 U.S. 190, 193-95 (1976), mentioned Article III aspects of third party or *jus tertii* standing only in passing, *id.* at 12a, and said not a word about separation of powers.

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2. *Accord, e.g., Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253-54 (1999) ("declin[ing] to address . . . claims at this stage" where they "do not appear to have been sufficiently developed below for us to assess"); *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988) ("declin[ing] to consider" issue where "[a] close reading of the opinion below . . . reveals that the Court of Appeals did not address this question").

B. The Amended Complaint Belies Petitioners' Characterization of PPS' Claims.

An equally fundamental problem with Petitioners' assertion of the separation of powers argument is its faulty factual premise. PPS does not broadly "attack the way in which MCOs deliver psychiatric care," Pet. at 5, nor does it seek to challenge or change the "fundamental way in which psychiatric managed care is delivered." Pet. at 20. To the contrary, what PPS seeks to change by its suit are the abusive and improper policies and procedures implemented by Petitioners within the managed care context that adversely affect both PPS' members and their patients. Amended Complaint, Introduction, Resp. App. at 1a-2a, 6a-7a, Counts I - VIII, *id.* at 30a-45a. PPS's pleading does not support the extravagant claim Petitioners describe.

Thus PPS does not, as Petitioners dramatically assert, seek to "commandeer the federal judiciary into resolving weighty, abstract issues of social policy best left — and until the decision below, traditionally left — to legislative determination." Pet. at 18. Rather, PPS seeks to address and reform *Petitioners'* own disregard and abuse of their contracts with PPS' members and their representations to its members' patients. The characterization Petitioners seek to place upon PPS' complaint is thus not supported by the pleaded facts — nor was it pressed in, or decided by, the court of appeals. As this Court held long ago in *Hormel v. Helvering*, it is fundamental to our system that the parties join issue on the facts prior to appeal:

> [O]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is

> essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

312 U.S. 552, 556 (1941). Petitioners' "straw man" analysis of the Amended Complaint is bombast, not fact. It is not a possible construction of the Amended Complaint, especially under Rule 12, and neither PPS nor the lower courts were provided with any opportunity to address it. Because this argument is based on claims not asserted here, this is manifestly not a proper issue for certiorari review.

CONCLUSION

For all the foregoing reasons, Respondent Pennsylvania Psychiatric Society respectfully requests that the Petition be denied.

Respectfully submitted,

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Dated: August 14, 2002

APPENDIX

APPENDIX — AMENDED COMPLAINT DATED AUGUST 27, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 99-937

Judge Gary L. Lancaster

Chief Mag. Judge Kenneth J. Benson

PENNSYLVANIA PSYCHIATRIC SOCIETY,

Plaintiff,

v.

GREEN SPRING HEALTH SERVICES, INC., MAGELLAN HEALTH SERVICES, INC., HIGHMARK, INC., KEYSTONE HEALTH PLAN WEST, INC., KEYSTONE HEALTH PLAN CENTRAL, INC., and KEYSTONE HEALTH PLAN EAST, INC.,

Defendants.

AMENDED COMPLAINT

Plaintiff Pennsylvania Psychiatric Society, on behalf of its membership and their patients, brings this lawsuit to correct the defendant managed care organizations' systematic practice of refusing to authorize, and otherwise restricting, medically necessary and appropriate behavioral health care,

in violation of Pennsylvania law, NCQA accreditation standards, and defendants' agreements with mental health care providers and their patients. As and for its Complaint in this matter, plaintiff Pennsylvania Psychiatric Society hereby alleges as follows:

THE PARTIES

A. Plaintiff

1. Plaintiff Pennsylvania Psychiatric Society ("PPS") is a Pennsylvania non-profit corporation with its principal place of business at 777 East Park Drive, P.O. Box 8820, Harrisburg, PA 17105-8820. PPS represents physicians practicing psychiatric medicine in the Commonwealth of Pennsylvania, and brings this action on behalf of its members ("PPS-member psychiatrists") and their patients who are subscribers to the managed care plans at issue in this lawsuit ("patient-subscribers").

2. The PPS members on whose behalf PPS brings this lawsuit are psychiatric physicians licensed and practicing in the Commonwealth of Pennsylvania, under medical licenses conferred by the Commonwealth of Pennsylvania. These PPS-member psychiatrists entered into contracts with defendant Green Spring Health Services, Inc. ("Green Spring") to provide behavioral health and substance abuse services to patient-subscribers of the managed care plans.

3. The patient-subscribers on whose behalf PPS also brings this lawsuit are all subscribers to managed care plans offered in the Commonwealth of Pennsylvania, and which

are administered by Green Spring and Magellan, and/or are all patients of PPS-member psychiatrists.

B. Defendants

4. Green Spring Health Services, Inc. ("Green Spring"), is a Delaware corporation with its principal place of business at 5565 Sterrett Place, Suite 500, Columbia, Maryland 21044, and is in the business of supplying behavioral health and substance abuse services, as well as the credentialling of physicians to provide such services, under contract to managed care organizations. On information and belief, since Magellan Health Services, Inc. ("Magellan"), acquired a majority interest in Green Spring in April 1999, Green Spring has conducted managed care operations on behalf of, and under the control of, Magellan.

5. Magellan Health Services Inc. ("Magellan") is a Delaware corporation with its principal place of business at 3413 Peachtree Road NE, Suite 1400, Atlanta, Georgia 30326. Magellan is a behavioral health company that owns a majority interest in, and is a successor in interest to, Green Spring. Magellan participates in Green Spring's business of supplying behavioral health and substance abuse services, as well as the credentialling of physicians to the Provider Network established by Green Spring, under contract to managed care organizations. On information and belief, since acquiring a majority interest in Green Spring in April 1999, Magellan has authorized Green Spring to conduct managed care services on Magellan's behalf. Magellan itself acts to credential, or deny credentials, to providers participating in the Green Spring Provider Network, and was doing so even before its acquisition of Green Spring in April 1999.

6. Four Blue Cross companies operate in the Commonwealth of Pennsylvania. These companies are: (1) Highmark, Inc. ("Highmark") (western Pennsylvania); (2) Independence Blue Cross (Philadelphia and surrounding counties); (3) Blue Cross of Northeastern Pennsylvania (covering Scranton and Wilkes-Barre); and (4) Capital Blue Cross (central Pennsylvania and Harrisburg). This Complaint names as defendants the managed care affiliates of three of these entities that have entered into contracts with Green Spring — Highmark, Capital Blue Cross ("CBC") and Independence Blue Cross ("IBC").

7. Highmark is a non-profit corporation with its principal place of business at 1800 Center Street, Camp Hill, Pennsylvania 17089. Highmark is licensed by the Pennsylvania Insurance Department to operate a health service plan. Highmark was created in 1996 by the consolidation of Blue Cross of Western Pennsylvania and Pennsylvania Blue Shield. Highmark has participated, and continues to participate, in the administrative policies, procedures and practices at issue in this lawsuit, including the credentialling of physicians to Green Spring's Provider Network, the reimbursement of physicians for services provided, and the determination of the quality and level of care to be provided by PPS-member psychiatrists.

8. Keystone Health Plan West, Inc. ("KHPW") is a Pennsylvania incorporated business with its mailing address at 120 Fifth Avenue, Suite 922, Pittsburgh, PA 15222-3099. KHPW is a health maintenance organization owned by Blue Cross of Western Pennsylvania (50% capital stock) and Pennsylvania Blue Shield (50% capital stock). By virtue of

the consolidation of Blue Cross of Western Pennsylvania and Pennsylvania Blue Shield, Highmark is the ultimate owner of and successor in interest to KHPW. In conjunction with and through KHPW, Highmark offers managed care products, such as KeystoneBlue, SecurityBlue and CommunityBlue.

9. Keystone Health Plan Central, Inc. ("KHPC") is a Pennsylvania incorporated business with its mailing address at 300 Corporate Center Drive, Suite 620, P.O. Box 8812, Camp Hill, Pennsylvania 17011. KHPC is a health maintenance organization owned by Capital Blue Cross (50% capital stock) and Pennsylvania Blue Shield (50% capital stock). KHPC offers managed care products such as HealthOne, KeystoneBlue, SecurityBlue and CommunityBlue.

10. Keystone Health Plan East, Inc. ("KHPE") is a Pennsylvania incorporated business with a mailing address at Ste. 103E, 3 Bala Plaza East, 251 St. Asaphs Road, Bala-Cynwyd, Pennsylvania 19004. KHPE is a health maintenance organization owned by Delaware Valley HMO, Inc. (50% capital stock) and Keystone Ventures, Inc. (50% capital stock). KHPE offers managed care products such as Keystone Health Plan East.

11. On information and belief, the defendants were the agents for one another and were acting within the course and scope of such agency at all times mentioned herein.

C. Jurisdiction & Venue

12. Jurisdiction over defendants is proper pursuant to 28 U.S.C. § 1330.

13. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(a)(2).

THE FACTS

D. Overview

14. The first aspect of Green Spring's wrongful conduct concerns its relationships with Providers who are part of the Green Spring physician network. Green Spring attracts physicians, and avoids regulatory scrutiny, by publishing facially unobjectionable treatment standards and procedures. In actual practice, however, Green Spring suppresses utilization by: (1) refusing to credential physician applicants, or creating insurmountable obstacles to physician credentialling; (2) creating and fostering burdensome paperwork and administrative requirements that make timely, medically appropriate treatment of patient-subscribers virtually impossible; (3) failing to pay Providers for services rendered, or delaying payments for "clean claims" beyond the 45-day time limit imposed by section 2166 of the Quality Health Care Accountability and Protection Act; and (4) interfering directly with physician-patient relations.

15. The second aspect of Green Spring's wrongful conduct concerns its relationships with patient-subscribers to the Plans. The Plans and Green Spring encourage

subscriber participation in managed care plans by advertising the availability of a full network of mental health and substance abuse treating physicians, as well as the availability of a certain number of outpatient treatment sessions and inpatient days of treatment. When subscribers join the managed care plans, however, the Plans and Green Spring do not provide the advertised level of mental health and substance abuse services. Green Spring intentionally suppresses utilization of services below the levels promised under the managed care plans by: (1) creating paperwork and authorization requirements that make utilization of advertised levels of service by patient-subscribers impossible; (2) denying authorization for medically necessary and appropriate treatment of mentally distressed patient-subscribers when they are at their most vulnerable and when they are least likely to protest treatment decisions; (3) often authorizing less expensive and inadequate treatment that is not within the applicable standard of care; and (4) interfering with patient-subscriber relations with their psychiatrists.

E. Green Spring's Contracts With Managed Care Organizations

16. KHPW, KHPC and KHPE (collectively, the "Plans") have entered into contracts with Green Spring to provide behavioral health services to the subscribers of the Plans. Copies of the respective Managed Care Service Agreements, or excerpts thereof, between the Plans and Green Spring (which are on file with the Commonwealth Department of Health) are attached hereto as Exhibits A, B and C, respectively.

17. PPS-member psychiatrists are third-party beneficiaries to the Managed Care Services Agreements between Green Spring and the Plans.

18. Under the Managed Care Service Agreements, the Plans are accountable for complying with all applicable state laws and standards with respect to the behavioral health and substance abuse treatment provided under their managed care plans, as are their contractors, such as Green Spring and Magellan, which provide a portion of those services.

F. The Managed Care Organization Plans

19. Numerous patient-subscribers living in Pennsylvania seek mental health treatment under Health Maintenance Organization ("HMO") and other managed care plans maintained and operated by the Plans, including KeystoneBlue, SecurityBlue, CommunityBlue, and HealthOne.

20. Green Spring administers the mental health care benefit of these various Plans. Under this managed care arrangement, individual psychiatric physicians, including PPS-member psychiatrists, who are independently licensed and trained to render professional services to their patients, are primarily responsible for preparing treatment plans for their patients and rendering that treatment. Green Spring, however, employs caseworkers, who are generally not licensed or trained psychiatrists and who do not have the clinical background to diagnose the medical needs of patient-subscribers, to evaluate and approve the treatment plans that determine the nature of reimbursements for professional care.

21. The Plans typically represent to the public, psychiatrists, subscribers, patient-subscribers and employers that the Plans will provide mental health benefits for up to 20 outpatient treatment sessions per calendar year, and up to 30 inpatient days per consecutive 12-month period, with low or no co-payments and low or no deductibles for its patient-subscribers.

G. Provider Agreements between PPS-Member Psychiatrists and Green Spring

22. Green Spring's services include referring patient-subscribers to physicians who render mental health and/or chemical dependency treatment services.

23. The PPS-member Psychiatric Physicians entered into individual and/or group Provider Participation Agreements with Green Spring ("Provider Agreements"), pursuant to which the physicians agreed to render mental health and/or chemical dependency treatment services to individuals covered by benefit plans, including plans sponsored by Highmark. A specimen copy of a Provider Agreement is attached hereto as Exhibit D.

24. The term of the Provider Agreements is two years, with a ninety (90) day notice of termination period applicable to both parties.

25. Psychiatric physicians are bound to treat patient-subscribers in accordance with certain ethical standards as a result of their licensure in the Commonwealth of Pennsylvania.

26. Green Spring is in the business of contracting with psychiatric physicians to form a network of providers of mental health and substance abuse treatment. Green Spring enters into contracts with health plans, managed care organizations ("MCO") or self-insured employers, to which Green Spring supplies its provider network as the mental health/substance abuse component of a health plan or MCO.

27. In Pennsylvania, Green Spring's network of providers is the sole source of mental health/substance abuse treatment available to subscribers of Highmark, CBC and IBC managed care health plans, including KHPW, KHPC and KHPE (collectively, "the Plans").

28. Because Highmark has a dominant market share in Western Pennsylvania, and to a great extent in Central and Eastern Pennsylvania, psychiatric physicians must contract with Green Spring to obtain access to, and provide services for, patient-subscribers requiring mental health/substance abuse services.

29. Because Magellan and Green Spring administer most of the monitoring and approval of behavioral health treatment plans for Aetna U.S. Healthcare and Independence Blue Cross, the two dominant insurers in Eastern Pennsylvania, as well as several non-defendant insurers in Western Pennsylvania, psychiatric physicians in Pennsylvania must utilize Magellan and Green Spring to obtain access to, and provide services for, the great majority of patients requiring mental health/substance abuse services.

30. Using its dominant market power as the source of all referrals for subsidiaries of Highmark and the Plans, Green Spring and Magellan, in conjunction with Highmark and the Plans, maximize profits on various managed health care insurance products by inappropriately limiting the quantity and quality of mental health/substance abuse services provided to patient subscribers of Highmark and the Plans, as well as the amounts paid to PPS-member psychiatrists for providing those services.

31. This Complaint arises from Green Spring's violation of its contractual, common-law and statutory obligations to authorize PPS-member psychiatrists to provide medically necessary substance abuse and mental health services. Green Spring is contractually obligated to administer such services on behalf of the defendant managed care plans in the Commonwealth of Pennsylvania, and to compensate PPS-member psychiatrists for providing those services. The effects of Green Spring's failures fall into two categories: (1) interference with PPS-member psychiatrists' ability to practice psychiatry to the extent guaranteed in their Provider Agreements with Green Spring and within the applicable standard of care; and (2) directly jeopardizing the mental health and welfare of patient-subscribers. Both categories result from Green Spring's acts of suppressing utilization of medical resources.

32. The Provider Agreement states that Green Spring must provide medically necessary health services to patient-subscribers in a "prompt and efficient manner consistent with the standard of practice of the community in which the Provider renders Health Services." The Agreement also states

that Green Spring's utilization management procedures "shall not diminish Provider's obligation to render Health Services consistent with the applicable standard of care." Thus, the Provider Agreement requires the parties to work within the managed care system to ensure that patient-subscribers receive appropriate and ethical treatment.

33. The Provider Agreement also contains: (1) an arbitration provision requiring providers to arbitrate claims arising out of or relating to the Provider Agreement; and (2) a termination without cause provision, allowing either party to terminate the Provider Agreement with 90 written days notice to the other party.

34. As a practical matter, PPS-member psychiatrists do not exercise their right to arbitrate the issues raised by this Amended Complaint out of fear that Green Spring will retaliate by terminating their Provider Agreement without cause. The effect of such termination would be immediately catastrophic for most PPS-member psychiatrists, cutting off access to the great majority of their patients, and making the practice of psychiatry financially impossible in the Commonwealth of Pennsylvania.

H. The HMO Provider Panel

35. Psychiatrists who enter into Provider Agreements become part of a large panel of Providers for the managed care plans. Defendants represent to the public, employer-purchasers, and patient-subscribers that they have a large, qualified, stable group of psychiatric physicians and other professionals whose services are available to the patient-

subscriber under the managed care plans. The defendants use the quality, size and continuity of these Provider relationships to market the managed care plans. For example, the right to use the names of Provider psychiatrists in "promotional activities" is a benefit Green Spring specifically receives under the Provider Agreement. *See* Exh. D, Section 7.

I. Representations Concerning the Availability of Treatment

36. The Plans and Green Spring represent that the managed care plans will be administered according to certain practices and guidelines. PPS-member psychiatrists who entered into relationships with these patient-subscribers relied on these standards and guidelines, some of which are set forth below:

a. Typically, the Plans represent that patient-subscribers and psychiatrists will be allowed up to 20 outpatient treatment sessions per calendar year, and up to 30 inpatient days per consecutive 12-month period, so long as the sessions are medically necessary or appropriate. Certain summary of benefits charts state that "up to 20 visits per calendar year" of outpatient mental health treatment services and "30 days per 12 consecutive months" of inpatient treatment will be available to subscribers of the managed care plans.

b. The Plans represent that 7 days of detoxification, and 30 days of rehabilitation for substance abuse care may be authorized per year.

c. The Plans represent that adverse decisions by Green Spring about whether continued mental health treatment is appropriate or medically necessary may be freely appealed or challenged by the psychiatrist or patient-subscriber without undue burdens and without adverse consequences.

37. Despite the Plans' representation that a certain number of outpatient treatment sessions are available for medically necessary, mental health treatment through the managed care plans, Green Spring routinely and systematically limits the number of treatment sessions to far fewer, a practice which restricts the quantity, and undermines the quality, of behavioral health care received by patient-subscribers. The Plans and Green Spring do not openly disclose that psychiatrists are expected to deliver most mental health treatment in far fewer sessions than are advertised. Instead, the Plans, Green Spring misrepresents to the public, to employer-purchasers and to patient-subscribers that the managed care plans allow a certain number of treatment sessions per year when, in reality, internal guidelines result in benefit limitations hidden from patient-subscribers. A representative example of the managed care promotional materials discussing promised benefits is attached hereto as Exhibit E.

Appendix

J. Green Spring's Methods Of Utilization Suppression

1. Credentialling

38. Green Spring and Magellan hinder the physician credentialling process, and take affirmative steps to revoke physicians' credentials without justification.

39. Green Spring and Magellan have repeatedly made application to their Provider Panel difficult by not providing applications to doctors, or by claiming to have lost completed applications. For example, one PPS-member psychiatrist has attempted, in the four years preceding this Complaint, to apply for admission to the Green Spring Provider Panel. When he first filed his application with Green Spring, Green Spring stated that it lost the application. When Green Spring reportedly recovered the application, Green Spring rejected it because the professional insurance policy with the application had expired during the time the application was in Green Spring's possession. Most recently, Green Spring stated that it has the PPS-member psychiatrist's application, but that Green Spring cannot act on it because they have been taken over by Highmark. Throughout this period, Green Spring has failed to disclose its credentialling criteria to the PPS-member psychiatrist, in violation of section 2121(d) of the Quality Health Care Accountability and Protection Act.

40. In another instance, a PPS-member psychiatrist specializing in the treatment of cancer patients had her application returned to her by Magellan two months after it was submitted, indicating that she had not completed certain

pages of the application. Upon reviewing her submission, the PPS-member psychiatrist found that she had in fact completed the pages identified by Magellan. She nonetheless resubmitted a complete application. After receiving no word for three months, the PPS-member psychiatrist called Magellan and was told that they had never received her second application. She submitted a third application, which Magellan again returned, stating that the application lacked certain documents that the PPS-member psychiatrist had in fact already submitted. After submitting her fourth application, the PPS-member psychiatrist called Magellan a month later and was told that Magellan had received her application and was processing it. Upon calling Magellan two weeks later, however, she was told that Magellan had no application for her on file. The PPS-member psychiatrist called once more after another two months had passed to tell learn that the application had been received, but that it was not entered onto the system, and that it was missing her certificate of insurance. Despite the PPS-member psychiatrist's knowledge that she had in fact submitted her certificate of insurance, she faxed Magellan a copy her certificate that same afternoon. The PPS-member psychiatrist was then informed, two weeks later, that her application was missing a verification of her medical degree and internship, which had in fact been included with her earlier submissions, and which could only be obtained from her medical school and the hospital at which she completed her internship. The PPS-member psychiatrist still has not been credentialled into the Provider Network.

41. Throughout this period, the PPS-member psychiatrist has been unable to receive Green Spring/

Magellan authorizations, despite the fact that she is the only psychiatric oncologist in the region. When the PPS-member psychiatrist's distraught patient-subscribers called Green Spring in tears, pleading to be allowed to treat with the PPS-member psychiatrist given her unique expertise, Green Spring's response was reportedly, "You can't tell me she's the only psychiatrist who knows how to treat cancer patients."

42. Green Spring and Magellan have also decredentialled PPS-member psychiatrists without notice in violation of the termination provision of the Provider Agreements. For example, in November 1998, Green Spring, Highmark and/or Magellan decredentialled a PPS-member psychiatrist without notice, and contrary to the provisions of the Provider Agreement. The PPS-member psychiatrist only discovered the decredentialling after being told by a case manager that Green Spring had denied a treatment authorization. The PPS-member psychiatrist had seen patient-subscribers for a month after being decredentialled without notice. Although Green Spring eventually restored the PPS-member psychiatrist's credentials, her practice was seriously disrupted in the intervening time period.

43. Since the acquisition of Green Spring by Magellan in April 1999, Magellan has also required the re-credentialling of many PPS-member psychiatrists. Throughout this re-credentialling process, Magellan has repeatedly required one or more resubmissions by PPS-member psychiatrists. In addition, Magellan has decredentialled PPS-member psychiatrists without notice, after claiming to have lost their applications and/or after informing them that their applications were acceptable. Due

to being decredentialled, several PPS-member psychiatrists have been unable to continue their treatment of certain patient-subscribers, disrupting the continuity of care received by the affected patient-subscribers, and cutting off the PPS-member psychiatrists' access to their patients and new referrals.

44. In addition, Green Spring has failed to appoint subspecialists to its Provider Panels even when such panels were in need of such subspecialists, and even though Green Spring represents that such subspecialists are available. For example, Green Spring claimed to have a child psychiatrist on a panel in the Berks County area, and rejected Provider applications to the child psychiatrist subspecialty panel on the basis that the subspecialty was full. In actuality, there was no board-certified (or otherwise qualified) child psychiatrist on the panel. Green Spring refused to appoint a PPS-member psychiatrist who was board certified in child psychiatry, even though the supposed incumbent members of the child psychiatric panel were not board certified. Because Green Spring refused to staff the child psychiatry panel adequately, Providers referring patient-subscribers to child psychiatrists had to make referrals to psychiatrists in Philadelphia County or other distant areas for treatment, which limited patient-subscribers' use of those services.

2. Administrative burdens and authorization delays

45. Green Spring further suppresses behavioral health care utilization by imposing onerous and overly time-consuming administrative burdens.

46. Green Spring unreasonably delays treatment authorizations in violation of Standard UM 4 of the National Committee for Quality Assurance Standards for Accreditation. For example, one PPS-member psychiatrist has admitted to inpatient facilities patient-subscribers requiring medical care under the appropriate standard of care, only to encounter unreasonable delays in treatment authorization from Green Spring. In one instance, a patient-subscriber was admitted at approximately 9 a.m. in the morning, but Green Spring did not authorize treatment for the patient-subscriber until 4 p.m. that day. The mentally distressed patient-subscriber had to wait in the facility's hallway for the entire day for treatment authorization.

47. Green Spring authorizes inappropriately short periods of treatment, thereby increasing administrative burdens, and making appropriate and consistent patient care virtually impossible to accomplish. For example, when one PPS-member psychiatrist has treated severely disturbed patient-subscribers requiring prolonged inpatient care, Green Spring has required justification from him every 72 hours for continuation of such care. In attempting to obtain reauthorization from Green Spring, the PPS-member psychiatrist has been placed on hold for up to forty-five minutes, after which he must speak with several different levels of Green Spring representatives reiterating each time the patient-subscriber's entire history, in order to obtain authorization. Despite the PPS-member psychiatrist's time and effort to obtain reauthorization when continued inpatient care is medically necessary and appropriate, Green Spring has routinely refused to reauthorize the appropriate level of care, even where the patient-subscriber is suicidal or

assaultive. Because of these excessive administrative burdens, the PPS-member psychiatrist has withdrawn, in part, from active participation in the Green Spring panel, and has lost the patient relationship that was supported by the patient-subscriber's managed care plan.

48. For even the most profoundly distressed patient-subscribers, who pose a threat to themselves and/or others, Magellan has often required reauthorization for every day of inpatient care. Magellan has required daily reauthorization even though the severity of such patient-subscribers' mental conditions clearly make long-term inpatient care medically necessary and appropriate.

3. Failure to make payments

49. Green Spring has repeatedly failed to make timely payment, or any payment, in accordance with section 2166 of the Quality Health Care Accountability and Protection Act for services that PPS-member psychiatrists have provided to their patient-subscribers in keeping with the applicable standard of care.

50. Common Green Spring tactics include requiring repeated submissions and resubmissions of treatment and authorization documentation with the result of delaying or avoiding payment to PPS-member psychiatrists, as well as post-treatment denials of previously authorized treatment. The process of obtaining payment for services from Green Spring has lasted for two years or more in some cases involving PPS-member psychiatrists.

51. In another example, one PPS-member psychiatrist has provided mental health and/or chemical dependency treatment services, as a member of Green Spring's Preferred Provider Organization, to individuals covered by benefit plans, including plans sponsored by Highmark. The PPS-member psychiatrist's practice group sent invoices for services rendered by the PPS-member psychiatrist to Green Spring and Highmark. On information and belief, in approximately May of 1998, Highmark and Green Spring changed the practice group's "provider number" (required by Highmark and Green Spring for payment of providers) without notice. The failure of Highmark and Green Spring to supply the practice group with a correct provider number, or notify the practice group of the changed provider number, resulted in Highmark's improper refusal to make payment on many of the invoices. Highmark and Green Spring also failed to pay the practice group, instead making payment directly to patient-subscribers, contrary to the Provider Agreement and invoices.

4. Interference with Physician-Patient Relationships

52. Green Spring's policies also interfere with physician-patient relationships.

53. One PPS-member psychiatrist was the treating psychiatrist for a patient-subscriber, Ann Doe, who presented with symptoms of severe anxiety, and in a severely agitated state. The PPS-member psychiatrist accordingly recommended that Ann be hospitalized, but Green Spring would not authorize this "next level" of care. Ann's family

was so distressed by the inadequate care administered by Green Spring, which they identified with the PPS-member psychiatrist as her treating psychiatrist, that they no longer brought Ann for treatment to the PPS-member psychiatrist.

5. Other methods to suppress utilization

54. Green Spring effectively reduces utilization both through administrative policies, procedures and practices, and by directing patient-subscribers only to certain Providers.

55. In one example of utilization suppression through administrative means, Green Spring refers patient-subscribers to only one of the several locations where one PPS-member psychiatrist's practice group would see patient-subscribers. This Green Spring conduct limits the number of geographic options available to Green Spring subscribers, and reduces the continuity of care received by the PPS-member psychiatrist's patient-subscribers who do not reside near the one referral location. Green Spring's failure to utilize the other locations of the PPS member's practice thus suppresses the availability of care to patient-subscribers in the area of those practice locations.

56. Green Spring and the Plans also suppress utilization of mental health and substance abuse services by not publishing the names and practice locations of psychiatrists within the provider network to patient-subscribers. By contrast, the Plans publish the names and practice locations of other medical specialists participating in their provider networks.

57. For example, Highmark offers an Internet directory of professionals participating in its Preferred Blue programs. The directory specifically excludes psychiatrists from its listing, stating: "This on-line Preferred Blue (PPO) Directory does not display mental health or substance abuse providers."

58. As a result, patient-subscribers who receive mental health or substance abuse referrals from their primary care physicians must call Green Spring to learn what provider locations are available. On information and belief, Green Spring will only direct patient-subscribers to certain mental health and substance abuse providers in any given geographic region, despite the presence of other PPS-member psychiatrists within the provider network who practice in that region. In contrast, a patient-subscriber may freely choose from among any specialist in the Plans' provider directories for non-mental health/substance abuse referrals, without having to call plan administrators to obtain information about provider locations.

59. Green Spring's and the Plans' refusal to publish the names and practice locations of psychiatrists in the provider network suppresses the utilization of services by depriving patient-subscribers of the knowledge that their PPS-member psychiatrists are participating providers.

60. On information and belief, defendants have maintained profit-driven "Provider Profiles" to evaluate psychiatrists on the Green Spring Provider Panel, in violation of the financial incentives prohibition of section 2112 of the Quality Health Care Accountability And Protection Act.

61. The Provider Profiles reward individual psychiatrists for earning profits for the Plans and Green Spring and penalize psychiatrists for providing or seeking to provide medically necessary and appropriate care based upon the individual patient-subscriber's medical needs.

62. On information and belief, as part of its Provider Profiling system, Green Spring has evaluated, and continues to evaluate, individual psychiatrists using profit-based criteria, including: (1) the average number of sessions used per patient-subscriber (without regard to the seriousness of the patient-subscriber's condition or diagnosis); (2) the number of times the psychiatrist requests additional sessions (without regard to the appropriateness of additional treatment of a patient-subscriber's conditions or diagnosis); and (3) the number of times a psychiatrist appeals or challenges a Green Spring decision to withhold further treatment that the psychiatrist believes is necessary (without regard to the success or the merits of the appeals). Green Spring does not disclose the existence of the Provider Profile system in negotiating its Provider Agreements with psychiatrists or in marketing the managed care plans.

K. Defendants' Failure to Deliver the Plans' Promised Benefits To Subscribers

1. Authorization requirements

63. In addition to the above-described impact on physician practices, Green Spring's suppression of care utilization has a direct, adverse impact on patient-subscribers.

64. Green Spring delays authorization for treatment or requires re-authorizations for very short increments of treatment, making utilization of the number of visits represented to be available by the Plans impossible.

65. For example, Beth Doe is the member of a managed care plan under which she is entitled to 20 outpatient visits for psychiatric care per year. Green Spring's management of Beth Doe's case ensures that Beth will only receive, at most, approximately half of the care authorized by her plan. Green Spring will only authorize two to three visits per authorization request. Because of the paperwork burden of rejustifying and rescheduling subsequent requests, Beth is effectively allocated by Green Spring approximately 10 treatment visits per year, despite her need, in the medical judgment of her PPS-member psychiatrist, for additional outpatient visits.

2. Restrictive treatment authorizations

66. Green Spring has authorized treatment for severely disturbed individuals for as few as two days, and at the end of that time, denied authorization for additional care, despite the risk of suicide and other adverse health consequences to patient-subscribers.

67. Green Spring has also recklessly endangered the health of patient-subscribers by failing to reauthorize inpatient care after an initial period of hospitalization.

68. For example, Carol Doe, an agitatedly depressed, severely psychotic and manic patient-subscriber at risk of suicide was admitted for an initial five day inpatient care

episode. Green Spring insisted on discharging Carol after the five day period, despite warnings of her lack of improvement. The early discharge resulted in Carol attempting suicide, causing her physical injury, and serious regression in her mental state.

69. In another example, "Health One" subscriber Dorothy Doe was voluntarily admitted for five days of treatment for extreme depression, having been taken to the facility by the Pennsylvania State Police. After five days of inpatient treatment, Dorothy continued to be severely depressed. Despite the promise of full coverage for 30 days under her plan, Green Spring informed Dorothy, through her psychiatrist, that no more treatments would be available to her, and that she would have to be discharged. The next evening, Dorothy continued to have substance abuse problems and attempted suicide by slitting her wrists. Dorothy was later informed that payment for the earlier, authorized treatment has been denied. Dorothy had to spend considerable time and effort to secure payment for the earlier, approved, treatment, and was never compensated for the adverse consequences of the denial of treatment.

70. Green Spring's repeated denial of continued care for suicidal or severely depressed patient-subscribers represents a pattern of refusing authorization for treatment for patient-subscribers who are at their most vulnerable and who are least able to protest or oppose Green Spring's treatment decisions and denials. This systematic refusal to authorize medically necessary and appropriate continued care effectively deprives patient-subscribers of the Plans' promised benefits because: (1) the diminished mental

capacity of suicidal or severely depressed patient-subscribers makes opposition from patient-subscribers unlikely; and (2) because PPS-member psychiatrists do not have the resources to engage in the prolonged appeal of such decisions.

3. Arbitrary denials of care

71. Green Spring restricts the level and quality of care based on arbitrary criteria that do not consider medical necessity and appropriateness, in violation of section 2152 of the Quality Health Care Accountability and Protection Act, and Standard AR 3 of the National Committee for Quality Assurance Standards for Accreditation.

72. Green Spring has refused to authorize proposed treatment plans because the treatment maintains the same course of therapy provided in previous treatment plans.

73. For example, one PPS-member psychiatrist has proposed treatment plans that were medically necessary and appropriate for her patient-subscribers. In each instance, the Green Spring "Care Manager" refused to authorize the treatment, stating that the treatment plan being proposed for the next round of sessions was the same as the treatment plan proposed for the sessions that had already taken place. As a result, PPS-member psychiatrists are often unable to provide medically necessary and appropriate treatment to patient-subscribers who do not respond to therapy within the arbitrary time frame allotted to patient-subscribers by Green Spring.

4. Interference with patient-psychiatrist relations

74. Green Spring caseworkers, who are generally not trained or licensed psychiatrists and who never meet the patient-subscriber, are called upon to make critical decisions about whether continued treatment is appropriate. These decisions are based upon internal guidelines and standards developed to increase profits by denying care. The internal guidelines and standards conflict with Green Spring's obligations under its Provider Agreements and contradict defendants' representations to employer-purchasers and patient-subscribers regarding the mental health benefits available under the managed care plan.

75. Under the Provider Agreement, psychiatrists are required to furnish patient-subscribers with appropriate treatment of the type that the psychiatrist "customarily provides." Yet Green Spring often interferes with the psychiatrist-patient relationship by refusing to authorize treatment sessions that the treating psychiatrist has determined are medically necessary and appropriate given the specific needs of the individual patient-subscriber.

76. Green Spring has contacted individual patient-subscribers, and intervened in their utilization of health care benefits. For example, Eileen Doe, a treatment refractory (*i.e.*, not readily yielding to treatment) patient-subscriber being treated under a plan associated with Green Spring, was recently contacted by a Highmark "caseworker" who informed Eileen that she had been assigned to her case and would serve as her "friend," to make sure she was getting "proper treatment" from her doctor. Highmark's direct contact

with Eileen made the patient-subscriber uncomfortable, compromised the privacy of the psychiatrist-patient relationship, and interfered with the delivery of medical care.

5. Disfavoring authorizations of treatment by psychiatrists

77. Green Spring often authorizes treatments by psychologists and therapists rather than psychiatrists, even where psychiatric treatment is clinically indicated.

78. Green Spring has facilitated treatment by psychologists and therapists, because of the lower costs associated with these services, by imposing fewer administrative and authorization requirements on psychologists and therapists.

79. Such referrals are often not in the patient-subscribers' best interests, and result in an inappropriate level and type of care for the patient-subscriber.

L. Failure to Address PPS-Member Psychiatrists' Concerns

80. Members of PPS have requested that Green Spring, in good faith, and pursuant to their Provider Agreements, rectify Green Spring's wrongful conduct.

81. Through their representatives, PPS-member psychiatrists have requested disclosure of certain Green Spring materials mentioned within this complaint in an attempt to establish a meaningful dialogue. For the most part,

the Plans and Green Spring have failed to disclose the requested materials. In good faith, PPS-member psychiatrists do not believe that the response received from the Plans and Green Spring can lead to a resolution of the issues raised by this Complaint.

CAUSES OF ACTION

COUNT I

BREACH OF CONTRACT

(PPS v. GREEN SPRING, THE PLANS, MAGELLAN & HIGHMARK)

82. Plaintiff incorporates by reference all allegations contained in paragraphs 1 through 74 above, as though set forth herein at length.

83. Pursuant to the Provider Agreement and other agreements and representations, Defendants were obligated to administer mental health and substance abuse managed care operations that reimbursed psychiatrist physicians who provided medically necessary and appropriate treatment within the applicable standard of care. Typically, up to 20 outpatient visits per calendar year, and 30 days of inpatient treatment per consecutive 12-month period, were covered under the managed care plans.

84. Defendants have refused to authorize payment to PPS-member psychiatrists for substance abuse and mental health treatments that were medically necessary and

appropriate, and of the type the PPS-member psychiatrists normally provide to non-managed care patients in keeping with the applicable standard of care. Defendants set limits on treatment that do not adequately provide for the needs of individual patient-subscribers, and that are designed to maximize profits by denying care that defendants are contractually obligated to administer in accordance with both the Provider Agreements and the managed care plans.

85. Moreover, the onerous administrative burdens imposed by Defendants, including unreasonably short authorization periods and excessively time-consuming authorization procedures, make it overly-burdensome for PPS-member psychiatrists to provide medically necessary and appropriate treatment within the applicable standard of care.

86. This and other conduct constitutes a breach of Defendants' obligations to provide payment to Providers for appropriate treatment of patient-subscribers within the applicable standard of care.

87. By these and other actions, Defendants have violated the obligations owed to PPS-member psychiatrists under the Provider Agreements, to their financial and professional detriment.

WHEREFORE, Plaintiff Pennsylvania Psychiatric Society respectfully requests that the Court enter judgment:

a. declaring that Defendants have violated their obligations to the PPS-member psychiatrists under the

Provider Agreements by failing to authorize and make timely payment for medically necessary and appropriate mental health services that PPS-member psychiatrists normally provide in keeping with the applicable standard of care;

b. ordering Defendants to eliminate or redesign the administrative policies, practices and procedures that make it overly-burdensome to obtain authorization and payment for the provision of medically necessary and appropriate care that falls within the coverage of the managed care plans;

c. awarding damages to PPS on behalf of its member psychiatrists for the loss of patients, loss of income related to the wrongful denial of medically necessary and appropriate care, increased administrative costs, and all other losses, plus interest and costs;

d. awarding punitive damages to PPS on behalf of its member psychiatrists; and

e. granting such further relief as the Court may deem appropriate.

COUNT II

BREACH OF CONTRACT
(PPS v. GREEN SPRING, THE PLANS, MAGELLAN & HIGHMARK)

88. Plaintiff incorporates by reference all allegations contained in paragraphs 1 through 80 above, as though set forth herein at length.

89. Defendants' Provider Agreements with PPS-member psychiatrists state that their administrative procedures shall not diminish the Provider's obligation to render health services consistent with the applicable standard of care.

90. Defendants have interfered with the Providers' legal obligations to render said Health Services consistent with the applicable standard of care because of its aggressive use of utilization reviewers that interfere with the Providers' ability to render services within the applicable standard of care.

WHEREFORE, Plaintiff Pennsylvania Psychiatric Society respectfully requests that the Court enter judgment:

a. declaring that the administrative policies, procedures and practices employed by Defendants violate Defendants' obligations under the Provider Agreements to authorize medically necessary and appropriate mental health services within the applicable standard of care;

b. ordering Defendants to eliminate the administrative policies, procedures and practices that prevent Providers, including PPS-member psychiatrists, from providing medically necessary and appropriate mental health and substance abuse services within the applicable standard of care, as required under the Provider Agreements; and

c. granting such further relief as the Court may deem appropriate.

Appendix

COUNT III

BREACH OF CONTRACT
(PPS v. GREEN SPRING, THE PLANS, MAGELLAN & HIGHMARK)

91. Plaintiff incorporates by reference all allegations contained in paragraphs 1 through 83 above, as though set forth herein at length.

92. Pursuant to the Provider Agreement, Defendants may only terminate a Provider from the provider network after 90 days' notice.

93. Certain PPS-member psychiatrists were terminated without notice, in violation of the Provider Agreement. These terminations violated Defendants' contractual obligations to the detriment of these PPS-member psychiatrists.

WHEREFORE, Plaintiff Pennsylvania Psychiatric Society respectfully requests that the Court enter judgment enjoining Defendants from terminating Providers in a manner inconsistent with the Provider Agreement.

Appendix

COUNT IV

BREACH OF CONTRACTUAL DUTY OF GOOD FAITH AND FAIR DEALING (PPS v. GREEN SPRING, THE PLANS, MAGELLAN & HIGHMARK)

94. Plaintiff incorporates by reference all allegations contained in paragraphs 1 through 86 above, as though set forth herein at length.

95. Defendants have delayed and failed to pay amounts owed to PPS-member psychiatrists.

96. Defendants have failed to identify and refer patients to certain treatment locations of PPS-member psychiatrists, adversely affecting the psychiatrists' practices. Defendants have failed to publish in their provider directories the names and practice locations of available mental health and substance abuse professionals, despite publishing that information for non-mental health professionals. Defendants have designed their utilization and referral management system to suppress utilization and to limit the number of geographic options for service available to their patient-subscribers, depriving patient-subscribers of convenient access to PPS-member psychiatrists within the Provider Network.

97. Through the Provider Agreements, Defendants obtained the benefit of advertising the availability of services from Providers, including PPS-member psychiatrists. In practice, however, Defendants deprive those Providers of

the referrals and visits that should be generated by participation in the network by only disclosing limited geographic options for services to subscribers. Defendants therefore deprive Providers of the benefits that should arise from their bargained-for participation in provider networks.

98. Defendants' actions are not in good faith. As a direct and proximate result of Defendants' actions, PPS-member psychiatrists have suffered and continue to suffer serious damages, including but not limited to, loss of money owed by Defendants, loss of use of said money, and loss of interest on said money.

WHEREFORE, Plaintiff Pennsylvania Psychiatric Society respectfully requests that the Court enter judgment:

a. declaring that Defendants' administrative policies, procedures and practices breach Defendants' contractual duty of good faith and fair dealing under the Provider Agreements;

b. enjoining Defendants, *inter alia*, from their practice of referring patient-subscribers to only one location for multiple practice, individual, or group practice Providers;

c. ordering Defendants, *inter alia*, to publish in their provider directories the names and practice locations of mental health and substance abuse professionals;

d. awarding damages, plus interest and costs, to PPS-member psychiatrists for amounts due and owing from Defendants that have not been paid within 45 days of requesting payment from Green Spring and the Plans for the provision of medically necessary and appropriate care;

e. ordering an accounting from Defendants of all amounts due and owing in excess of 45 days since requesting payment from Green Spring and the Plans, with an explanation for the reason for non-payment and a timetable for resolving these claims; and

f. granting such further relief as the Court may deem appropriate.

COUNT V

INTERFERENCE WITH PRESENT AND PROSPECTIVE ECONOMIC ADVANTAGE (PPS v. GREEN SPRING, THE PLANS, MAGELLAN & HIGHMARK)

99. Plaintiff incorporates by reference all allegations contained in paragraphs 1 through 91 above, as though set forth herein at length.

100. The psychiatrist-patient relationship is a uniquely personal professional/business relationship based upon trust. The success of therapy depends upon the atmosphere of confidence and trust developed between the psychiatrist and the patient, as well as sufficient access by the patient to his or her psychiatrist. This relationship takes time to establish and is not easily transferred.

101. The Defendants were aware of the uniquely personal nature of the psychiatrist-patient relationship during all time periods relevant to the Complaint.

102. The Defendants have intentionally, willfully and recklessly interfered with psychiatrist-patient relations by: (1) failing to authorize medically necessary and appropriate mental health treatment; (2) failing to disclose their systemic efforts to reduce the level and quality of care provided by PPS-member psychiatrists to patient-subscribers who participate in defendants' managed care plans; and (3) failing to create an adequate provider network; and (4) obstructing access by patient-subscribers to their psychiatrists by, among other means, inappropriately limiting care, failing to disclose relevant credentialling criteria to psychiatrists seeking to be credentialled, and failing to provide written notice of the denial of initial credentialling or recredentialling to applicants to the Provider Network.

103. The Defendants are liable for *per se* tortious conduct for violation of the standards established by the Quality Health Care Accountability and Protection Act.

104. Through these activities Defendants intentionally, willfully and recklessly interfered with the professional business relationship and psychiatrist-patient relationship between PPS-member psychiatrists and their patient-subscribers, to the detriment of both psychiatrist and patient.

WHEREFORE, Plaintiff Pennsylvania Psychiatric Society respectfully requests that the Court enter judgment:

a. ordering Defendants to eliminate the administrative policies, procedures and practices that make it overly-burdensome to obtain authorization for medically necessary and appropriate care and that obstruct patient-subscribers' access to their PPS-member psychiatrists;

b. awarding damages to PPS-member psychiatrists for the loss of patients, loss of income related to the wrongful denial of medically necessary and appropriate care, increased administrative costs, and all other losses, plus interest and costs;

c. ordering Defendants to immediately disclose to Plaintiff and its members Defendants' qualifications and credentialling criteria in full;

d. awarding punitive damages to PPS-member psychiatrists for Defendants' intentional, willful and reckless conduct; and

e. granting such further relief as the Court may deem appropriate.

COUNT VI

TORTIOUS INTERFERENCE WITH PHYSICIAN-PATIENT RELATIONS (PPS v. GREEN SPRING, THE PLANS, MAGELLAN & HIGHMARK)

105. Plaintiff incorporates by reference all allegations contained in paragraphs 1 through 97 above, as though set forth herein at length.

106. As discussed above, PPS-member psychiatrists have a professional relationship with their patient-subscribers based upon trust. This relationship also requires complete independence and integrity of communication, uninhibited

by inappropriate utilization management concerns, for the purposes of diagnosis and treatment.

107. Defendants have intentionally and without justification interfered with psychiatrist-patient treatment relations by contacting patient-subscribers directly for the purpose of influencing the course of treatment, and by appointing "case worker/friends" to patient-subscribers. On information and belief, these case workers influence patient-subscribers' willingness to seek treatment, interfere with the free disclosure of information from patient-subscribers to PPS-member psychiatrists, and interfere with PPS-member psychiatrists' ability to effectively diagnose illness and provide treatments.

108. Defendants have also intentionally and without justification interfered with the psychiatrist-patient relationship by: (1) failing to authorize medically necessary and appropriate mental health treatment; (2) failing to disclose their systemic efforts to reduce the level of care provided by PPS-member psychiatrists to patient-subscribers who participate in defendants' managed care plans; and (3) failing to create an adequate provider network; and (4) obstructing access by patient-subscribers to their psychiatrists by, among other means, inappropriately limiting care, failing to disclose relevant credentialling criteria to psychiatrists seeking to be credentialled, and failing to provide written notice of the denial of initial credentialling or recredentialling to applicants to the Provider Network.

109. Such actions constitute an impediment to the professional relationship between PPS-member psychiatrists and their patient-subscribers.

110. Defendants are liable for *per se* tortious conduct for violation of the standards established by the Quality Health Care Accountability and Protection Act.

111. Through these activities, Defendants intentionally, willfully and recklessly interfered with the psychiatrist-patient relationship between PPS-member psychiatrists and their patient-subscribers, to the detriment of both psychiatrist and patient.

WHEREFORE, Plaintiff Pennsylvania Psychiatric Society respectfully requests that the Court enter judgment:

a. enjoining Defendants from their practice of appointing case workers to individual patient-subscribers, and from using such case workers to interfere with physician-patient relations;

b. ordering Defendants to eliminate the administrative policies, procedures and practices that make it overly-burdensome to obtain authorization for medically necessary and appropriate care and that obstruct patient-subscribers' access to their PPS-member psychiatrists;

c. awarding damages to PPS-member psychiatrists for the loss of patients, loss of income related to the wrongful denial of medically necessary and appropriate care, increased administrative costs, and all other losses, plus interest and costs;

d. ordering Defendants to immediately disclose to Plaintiff and its members Defendants' qualifications and credentialling criteria in full;

e. awarding punitive damages to PPS-member psychiatrists for Defendants' intentional, willful and reckless conduct; and

f. granting such further relief as the Court may deem appropriate.

COUNT VII

FRAUDULENT MISREPRESENTATION (PPS v. GREEN SPRING, THE PLANS, MAGELLAN & HIGHMARK)

112. Plaintiff incorporates by reference all allegations contained in paragraphs 1 through 104 above, as though set forth herein at length.

113. Defendants falsely represented to patient-subscribers that the Plans would provide the following mental health benefits, among others: (1) a large, stable panel of psychiatrists to provide adequate mental health treatment for up to 20 outpatient visits per calendar year, and 30 inpatient days per 12-month period, and (2) for substance abuse treatment, up to 7 days of detoxification, and 30 days of rehabilitation for substance abuse care per year.

114. Defendants falsely represented to psychiatrists that they would receive the following benefits, among others, by joining the Provider Network: (1) they would be part of a Provider Panel; (2) they would be reimbursed at agreed-upon rates for mental health treatment; and (3) they would be able

to provide substance abuse and mental health treatment to their patient-subscribers within the applicable standard of care.

115. Instead, medically necessary and appropriate treatment within the managed care plans' benefit limits has been denied when such treatment would normally be provided in keeping with the applicable standard of care.

116. Additionally, Defendants routinely authorize treatment by psychologists, or other non-physician Providers, to reduce costs, when treatment by psychiatrists is clinically indicated.

117. Relying on these and other misrepresentations, to their detriment, patient-subscribers, including Ann Doe, agreed to participate in the managed care plans.

118. Relying on these and other misrepresentations, to their detriment, the PPS-member psychiatrists agreed to become Providers for the managed care plans.

119. Relying on these and other misrepresentations, to their detriment, patient-subscribers and PPS-member psychiatrists entered into doctor-patient relationships in an effort to provide and receive appropriate treatment for substance abuse and mental health problems.

WHEREFORE, Plaintiff Pennsylvania Psychiatric Society respectfully requests that the Court enter judgment:

a. ordering Defendants to eliminate the administrative policies, procedures and practices that make it excessively difficult or impossible to gain membership on Defendant Green Spring's Provider Panels;

b. ordering Defendants to eliminate the administrative policies, procedures and practices that make it overly-burdensome to obtain authorization and payment for the provision of medically necessary and appropriate care that falls within the coverage of the managed care plans;

c. enjoining Defendants' referral of patient-subscribers to psychologists or other non-physician Providers where psychiatric care is clinically indicated;

d. awarding damages to PPS-member psychiatrists for the loss of patients, loss of income related to the wrongful refusal to authorize medically necessary and appropriate care, increased administrative costs, and all other losses, plus interest and costs;

e. awarding punitive damages to PPS-member psychiatrists; and

f. granting such further relief as the Court may deem appropriate.

COUNT VIII

VIOLATION OF THE PENNSYLVANIA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW (PPS V. GREEN SPRING, THE PLANS, MAGELLAN & HIGHMARK)

120. Plaintiff incorporates by reference all allegations contained in paragraphs 1 through 112 above, as though set forth herein at length.

121. Defendants have falsely advertised their managed care plans by providing for less than the amount of substance abuse and mental health services than were advertised.

122. Defendants represent that their services will meet applicable standards of behavioral health care. In reality, Defendants systematically refuse to authorize medically-necessary and appropriate treatment, with the result that patient-subscribers often receive behavioral health care that is below the applicable standard of care.

123. Defendants' actions have resulted in severe injuries to patient-subscribers, including Carol and Dorothy Doe.

124. Defendants' conduct is egregious and in direct violation of their obligations to patient-subscribers under their managed care plans.

WHEREFORE, Plaintiff Pennsylvania Psychiatric Society respectfully requests that the Court enter judgment:

a. awarding treble damages to patient-subscribers of the Plans for the natural and foreseeable consequences of

the Defendants' deceptive advertising and subsequent denial of medically necessary and appropriate care, and all other losses, plus interest and costs;

b. awarding counsel fees and costs to Plaintiff Pennsylvania Psychiatric Society; and

c. granting such further relief as the Court may deem appropriate.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GREEN SPRING HEALTH SERVICES, INC., *et al.*,
Petitioners,

v.

PENNSYLVANIA PSYCHIATRIC SOCIETY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONERS

The decision below allows a professional association—which has suffered no injury to itself—to seek sweeping changes to Pennsylvania's managed-care industry not on behalf of itself, and not on behalf of its member-psychiatrists, but on behalf of its members' patients—a remote third-party constituency with whom the association shares absolutely no affiliation. That expansive view of Article III standing runs directly counter to this Court's established precedents that litigants in the federal courts must raise their own claims based on their own injuries. It does not fit within any of the narrow exceptions this Court has recognized. Rather, as Judge Nygaard pointed out in dissent, the decision below takes two distinct exceptions from this Court's standing jurisprudence and then "piggy-back[s]" them one on top of the other to create yet a third exception, effectively "swal-

low[ing] up the long-standing *rule* that litigants must assert their own rights and interests." Pet. App. 24a (emphasis in original).

Respondent attempts to obfuscate the important federal question presented here by raising a litany of procedural objections. It suggests that, even though the Court does so routinely, it is somehow inappropriate for this Court to review a decision issued at the Rule 12(b) stage of proceedings, Opp. 6-7; that we improperly raised a new separation-of-powers argument, *id.* at 12-14, even though this Court has held that a party may advance additional arguments supporting the same *claim* raised below, *see Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992); and that we have misrepresented the breadth of its claims, Opp. 15-16, even though PPS itself characterized its lawsuit before the District Court as one seeking "broad-based changes" to the way in which psychiatric managed care is administered. Pet. App. 36a. Respondent's reluctance to join issue on the question presented is understandable, since it concedes—as it must—that the Third Circuit reached its decision by "allow[ing] one level of associational standing and one level of third-party standing." Opp. 11. Although it labors mightily to demonstrate how this "piggy-backing" approach is consistent with this Court's standing jurisprudence, respondent's only support is an inapposite case neither it nor the Third Circuit ever cited below.

Unless corrected, the Third Circuit's unprecedented rule threatens to permit the sort of attenuated claims and generalized grievances that have long been considered outside the jurisdiction of the federal judiciary. This Court should grant the petition and reverse.

1. Respondent begins by protesting that it is "premature" for this Court to review the decision below because it is still theoretically possible that, upon remand, PPS will be unable to satisfy even the new, liberalized standing rule that

the Third Circuit announced. Review is therefore improper, PPS reasons, because "the underlying factual development could obviate the need to resolve the issue as presented." *Id.* at 7.

The question presented by the petition is whether the novel "piggy-backing" rule the Third Circuit announced contravenes, *as a matter of law*, this Court's established standing jurisprudence. No amount of discovery will help resolve that pure legal question. This Court routinely grants certiorari to review such legal questions arising from decisions—like the one below—that are issued at the Rule 12(b) or summary-judgment stages and in which the court of appeals has remanded for additional proceedings. *See, e.g.*, *Christopher* v. *Harbury*, 122 S. Ct. 2179, 2184-85 (2002); *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 122 S. Ct. 681, 688 (2002).

2. Respondent next points out that the Third Circuit's decision adopts the same rationale as decisions from the Sixth and the District of Columbia Circuits. Opp. 7-8. We recognized as much in the petition; the ruling here is not some passing apparition that can be safely dismissed. Pet. 22-23. Respondents go on to suggest that the lack of a direct circuit split precludes review. Not so. This Court has often granted certiorari, despite a lack of disagreement within the circuits, where the petition raised an important question of federal jurisdiction—particularly one involving Article III standing. *See, e.g.*, *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 32-33 (1998); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 470 (1982).

In *Valley Forge*, the court of appeals had held that a group of plaintiffs had "citizen standing" under the Establishment Clause to challenge a government transfer of property to a religious institution. Although there was no appreciable circuit split, this Court nonetheless granted certiorari "[b]ecause of the unusually broad and novel view of standing

to litigate a substantive question in the federal courts adopted by the Court of Appeals." *Valley Forge*, 454 U.S. at 470. Likewise, the "unusually broad and novel view of standing" adopted by the Third Circuit below warrants this Court's review.

In *Lexecon*, the court of appeals construed 28 U.S.C. § 1407(a), which governs the transfer authority of the Judicial Panel on Multidistrict Litigation, in a manner entirely consistent with every other decision from the federal courts of appeals. 523 U.S. at 32-33. Despite the absence of a circuit split, this Court nonetheless granted certiorari to review the important jurisdictional and procedural question presented. *Id.*

Here, the case for certiorari is even clearer. The question presented implicates the core functioning of the federal judiciary. As this Court has squarely held, the rule that "a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties," is a "fundamental restriction" on the power of the federal judiciary. *Powers* v. *Ohio*, 499 U.S. 400, 410 (1991). The Third Circuit's expansive view of third-party standing threatens to do away with that fundamental limitation.

3. Moreover, as we argued in the petition (pp. 18-23), certiorari is particularly justified because the "fundamental limitation" the standing doctrine preserves is "built on a single basic idea—the idea of separation of powers." *Allen* v. *Wright*, 468 U.S. 737, 752 (1984). Respondents never suggest otherwise, but instead contend that we are precluded from invoking the separation of powers because we did not raise the argument below. Opp. 12-14.

PPS confuses *arguments* with *claims*. This Court has consistently held that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they

made below." *Yee* v. *City of Escondido*, 503 U.S. at 534. *See Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 78 n.2 (1988); *Illinois* v. *Gates*, 462 U.S. 213, 219-220 (1983); *Dewey* v. *City of Des Moines*, 173 U.S. 193, 197-198 (1899). The argument that the Third Circuit's decision threatens " 'the proper—and properly limited—role of the courts in a democratic society,' " *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)), is "not a new claim within the meaning of [the] rule, but * * * support[s] what has been [our] consistent claim": that the Third Circuit's expansive view of third-party standing directly conflicts with this Court's standing jurisprudence. *Lebron*, 513 U.S. at 379.

PPS's only other response on the separation of powers (Opp. 15-16) is to deny that its lawsuit really does seek the type of systemic reforms that would force the federal judiciary "to decide abstract questions of wide public significance." *Warth* v. *Seldin*, 422 U.S. at 500. Here, PPS has done a dramatic about-face. Before the District Court, when it was attempting to demonstrate that its suit would not require undue individual participation of its members, PPS maintained that individual participation would be unnecessary because it was seeking "broad-based changes" to the way in which psychiatric managed care is delivered. Pet. App. 36a. And again before the Court of Appeals, PPS emphasized time and again that it sought to reform a "systemic practice" and a "systemic problem" and the "systemic nature" of that problem. Br. of PPS 19, 21, 23. These "broad-based" attacks on the managed-care industry are, as we demonstrated in the petition (pp. 21-22), precisely the sorts of "debatable social judgment[s]" that are typically best left to the legislature. *Pegram* v. *Herdrich*, 530 U.S. 211, 221 (2000). The Third Circuit's unprecedented standing rule threatens that delicate balance between the legislature and the judiciary.

4. Finally, PPS's effort to prove that the decision below is consistent with this Court's precedents effectively boils down to citing a single case, *New York State Club Ass'n* v. *City of New York*, 487 U.S. 1 (1988). Opp. 10-11. Tellingly, PPS never cited the decision in its briefs before the Third Circuit, nor did the Court of Appeals see fit to rely on it in reaching its decision. Presumably that is because the case is entirely distinguishable.

In *New York State Club*, this Court held that an association—whose membership comprised a number of private clubs—had standing to challenge an antidiscrimination statute on behalf of the paid members of those constituent clubs. 487 U.S. at 8-9. There is nothing remarkable about such a result; it makes perfect sense under this Court's associational-standing cases to allow one umbrella association to sue on behalf of the members of its member-associations. That is because the doctrine of associational standing is premised on the idea that "the association 'and its members are in every practical sense identical.' " *United Food & Commercial Workers Union Local 751* v. *Brown Group, Inc.*, 517 U.S. 544, 552 (1996) (quoting *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958)). Under those circumstances there is no concern about whether "the interests [the organization] seeks to protect are germane to the organization's purpose." *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Here there is. The patients PPS purports to represent are *not* members of its membership, as in *New York Club*. Rather, they are third parties who have absolutely no ties to PPS. As we demonstrated in the petition (pp.15-16), there is good reason to suspect that a professional association dedicated to the welfare of psychiatrists might actually have an agenda different from its members' patients.

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For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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